**UNITED STATES OF AMERICA**

**BEFORE THE**

**FEDERAL ENERGY REGULATORY COMMISSION**

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| Building for the Future Through Electric Regional Transmission Planning and Cost Allocation | ) ) ) | Docket No. RM21-17-000 |

# REQUEST FOR REHEARING OF THE ELECTRICITY TRANSMISSION COMPETITION COALITION, THE RESALE POWER GROUP OF IOWA, AND LS POWER GRID, LLC

June 12, 2024

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Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[1] the Electricity Transmission Competition Coalition,[2] the Resale Power Group of Iowa, and LS Power Grid, LLC (collectively, "Competition Coalition") respectfully request rehearing of the final rulemaking order issued by the Commission in a 2-1 decision on May 13, 2024 in the proceeding captioned *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation* ("Order No. 1920" or "the Final Rule").[3] "It is long-established that the 'primary aim' [of the Federal Power Act] is the protection of consumers from excessive rates and charges."[4] Yet, Order No. 1920 proceeds, in the absence of legal authority or substantial evidence, to permit and finalize a so-called right of first refusal

[1] 18 C.F.R. § 385.713 (2023).

[2] The Competition Coalition is a broad-based and diverse coalition of manufacturing and retail electricity consumer organizations, state consumer advocates, public power, non-incumbent transmission developers, and others that support competition in transmission planning. A list of the Competition Coalition's members is provided in **Appendix A**.

[3] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, FERC Order No. 1920, 187 FERC ¶ 61,068, 89 Fed. Reg. 49,280 (June 11, 2024).

[4] *Xcel Energy Services v. FERC*, 815 F.3d 947, 952-53 (D.C. Cir. 2016).

("ROFR") or monopoly preference ("Monopoly Preference")[5] for "right-sized" replacement transmission facilities that are selected to meet Long-Term Transmission Needs.[6] Order No. 1920 errs in this regard for several reasons, as enumerated in the Statement of Issues/Specification of Errors and Argument sections below. Rehearing is warranted.

The Competition Coalition supports transmission investment driven by the needs of consumers and by competitive market outcomes. Competition in the transmission planning process for the right to develop and construct new transmission facilities reduces costs to consumers and drives efficiencies in project construction. The Competition Coalition supports competition and competitive prices to maintain just and reasonable transmission rates, consistent with Order No. 1000's pro-competition directives.[7] During the rulemaking proceeding, the Competition Coalition vigorously opposed, with extensive supporting evidence,[8] all proposals to establish monopoly preferences for incumbent public utilities to own and develop regional transmission projects, because restricting or otherwise impairing or limiting competition produces unjust, unreasonable, and unduly discriminatory or preferential rates. Although the Commission previously and unequivocally held that incumbent transmission owner preferences for regional transmission

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[5] Although the term "federal right of first refusal" or "ROFR" is often used to describe this monopoly preference and used in Order No. 1920, neither Order No. 1920 nor any earlier Commission order provides a grounding in federal law for such a right. The opportunity for incumbent transmission owners that Order No. 1920 seeks to create is, at best, a Commission-engineered preference for monopolies over competition, hence the Competition Coalition use of the term Monopoly Preference in this Rehearing Request.

[6] *See* Order No. 1920 at P 1702.

[7] *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323, *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 31134 (May 31, 2012), 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64390 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[8] *See* Competition Coalition Initial Comments (filed Aug. 17, 2022), Reply Comments (filed Sep. 19, 2022), and Motion for Leave to Answer (filed Feb. 1, 2024), Docket No. RM21-17. This Rehearing Request cites frequently to the comments of the Competition Coalition and other parties that filed comments in Docket No. RM21-17. If a citation refers to comments, but does not include a docket number, it can be assumed that the comments were filed in Docket No. RM21-17, like the citations used in Order No. 1920.

additions violated Section 206 of the Federal Power Act ("FPA") and were therefore unlawful, and that self-granted contractual preferences severely harmed the public interest, Order No. 1920 mandates the creation of the Monopoly Preference for existing transmission owners for certain new regional transmission projects. As a result, Order No. 1920 is arbitrary and capricious and cannot stand.

## I. BACKGROUND

Order No. 1920 provides the procedural history of the rulemaking process. The Competition Coalition participated in several rounds of comments, including the initial and reply comments to the Advanced Notice of Proposed Rulemaking ("ANOPR") and the initial and reply comments to the Notice of Proposed Rulemaking ("NOPR"). Many other parties filed comments. On February 1, 2024, the Competition Coalition also filed a Motion to Leave to Answer and Answer to Supplemental Reply Comments that certain Incumbent Transmission Owners filed on December 15, 2023.

## II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

The Competition Coalition respectfully specifies the following issues and errors in Order No. 1920:

1. **Issue:** Did Order No. 1920 satisfy the requirements under the first prong of Section 206 of the Federal Power Act and under the Administrative Procedure Act in mandating a preference for incumbent transmission owners for certain new right-sized replacement projects addressing Long-Term Transmission Needs?

   No. Order No. 1920 erred by failing to engage in reasoned decision-making and provide substantial evidence, under the first prong of Section 206 of the Federal Power Act and the Administrative Procedure Act, that existing transmission provider tariff provisions as concerns regional transmission planning and cost allocation and incumbent public utility rights and obligations – which do not include a right-sizing monopoly preference – are unjust, unreasonable, and unduly discriminatory or preferential. FERC Order No. 1920; 16 U.S.C. §§ 824d-824e; *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016); *Del. Div. of Pub. Advocate v. FERC*,

3 F.4th 461 (D.C. Cir. 2021); *Pub. Serv. Elec. & Gas v. FERC*, 989 F.3d 10 (D.C. Cir. 2021); *TransCanada Power Mktg. Ltd. v. Fed. Energy Regul. Comm'n*, 811 F.3d 1 (D.C. Cir. 2015); *Vistra Corp. v. FERC*, 80 F.4th 302 (D.C. Cir. Aug. 15, 2023), *cert. denied sub nom. Elec. Power Supply Assn. v. FERC*, No. 23-773, (U.S. May 28, 2024); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010); *FERC v. EPSA*, 577 U.S. 260 (2016).

2. **Issue:** Did the Commission exceed its statutory authority in mandating a preference for incumbent transmission owners for certain new right-sizing replacement projects addressing Long-Term Transmission Needs?

   Yes. Order No. 1920 failed to demonstrate that FERC has the legal authority under the Federal Power Act to mandate the issuance of a transmission monopoly preference or federal transmission franchise for the development and construction of electric transmission facilities in interstate commerce. FERC Order No. 1920; 16 U.S.C. §§ 824d-824e; *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) *citing Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001)("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'"); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)("[A]n agency literally has no power to act ... unless and until Congress confers power upon it."); *W. Va. V. EPA*, 597 U.S. 697, 721 (2022) ("extraordinary case[ ] . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 at P 268, fn 244, *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 31134 (May 31, 2012), 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64390 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)(Order No. 1000-A at P 361 "elimination of any federal rights of first refusal from Commission-jurisdictional tariffs and agreements *is necessary to address opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers* within regional transmission planning processes." Order No. 1000 – A at P 426 discussing replacements of existing facilities in a regional context "the term upgrade means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The term upgrades does not refer to an entirely new transmission facility. The concept is that there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others.")

3. **Issue:** Did Order No. 1920's so-called ROFR or right-sizing monopoly preference deviate from prior Commission precedent without reasoned explanation?

Yes. Order No. 1920 is arbitrary and capricious because it deviates from Order No. 1000 and prior policy and precedent without adequate explanation. FERC Order No. 1920; 16 U.S.C. §§ 824d-824e; *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999); *Belmont Municipal Light Dept. v. FERC*, 38 F.4th 173 (D.C. Cir. 2022); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018).

4. **Issue:** Did Order No. 1920 demonstrate that its so-called ROFR or right-sizing monopoly preference is just, reasonable, and not unduly discriminatory or preferential?

   No. The right-sizing ROFR or monopoly preference adopted in Order No. 1920 has not been demonstrated to be just, reasonable, and not unduly discriminatory, and is unjust, unreasonable, unduly discriminatory, and contrary to the public interest for several reasons. FERC Order No. 1920; 16 U.S.C. §§ 824d-824e; *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983); Order No. 1000-A, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 139 FERC ¶ 61,132 (May 17, 2012).

## III. ARGUMENT

A Commission order will be reversed on review if the order is arbitrary or capricious, reflects an abuse of discretion, is not otherwise in accordance with law, or is not supported by substantial evidence.[9] In order to satisfy its obligation to engage in reasoned decision-making, the Commission must examine the relevant data and articulate a rational connection between the facts found and the choices made.[10] The Commission must reach its conclusion through decision-making that is "reasoned, principled, and based upon the record."[11] Under the FPA, FERC's

[9] *Vistra Corp. v. FERC*, _ F.4th _, 2023 WL 5209555, Case No. 21-1214 at 18 (D.C. Cir. Aug. 15, 2023); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

[10] *Sacramento*, 616 F.3d at 528; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

[11] *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10, 20 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945, 953 (D.C. Cir. 2007); *see New York v. FERC*, 535 U.S. 1, 36 (2002); *see also Transmission Access Policy Group v. FERC*, 225 F.3d 667, 705, 716 (D.C. Cir. 2000) (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1021 (D.C. Cir. 1987)); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 893 (D.C. Cir. 1998).

factual findings are determinative so long as they are supported by substantial evidence.[12] The "substantial evidence" standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence."[13] Substantial evidence is "relevant evidence" that "a reasonable mind might accept as adequate to support a conclusion."[14] Additionally, to avoid an arbitrary and capricious decision or one that does not reflect reasoned decision-making, the Commission must consider all important aspects of the problem at issue.[15] It is "well established that the Commission must 'respond meaningfully to the arguments raised before it.'"[16]

While the Commission's determinations regarding rates, tariffs, and related practices involving technical issues are entitled to great deference, deference is not owed unless FERC "relied on its factual or technical expertise."[17] FERC's actions must also be consistent with the limits of the authority granted it by Congress, because "an agency literally has no power to act ... unless and until Congress confers power upon it."[18] Nor will deference be owed if FERC "has not substantiated the application of its policy, either through the development of specific facts or by making a reasoned explanation."[19] When the Commission fails to rely on its technical expertise

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[12] Section 313(b) of the FPA, 16 U.S.C. § 825l(b).

[13] *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3d Cir. 2014) (quoting *La. PSC v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008)).

[14] *N.J. Bd. of Pub. Utils.*, 744 F.3d at 9 (quoting *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011)).

[15] *See e.g. Motor Vehicle Mfs.*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem…") (*citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659, 666 (D.C. Cir. 1994) (given the complexity of the issue, FERC must more fully explain its decision).

[16] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015).

[17] *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 503 (5th Cir. 2016) (citing *La. PSC v. FERC*, 771 F.3d 903, 909 (5th Cir. 2014) and *South Carolina*, 762. F3d at 54-55).

[18] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)

[19] *El Paso Elec.*, 832 F.3d at 503 (quoting *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 45 (5th Cir. 1989)).

or fails to substantiate the application of its policy, an appellate court will conclude that FERC's actions are arbitrary and capricious.[20]

### A. ERROR #1: Order No. 1920 Erred By Failing To Engage In Reasoned Decision-Making And Provide Substantial Evidence, Under The First Prong Of Section 206 Of The Federal Power Act And The Administrative Procedure Act, To Show That Existing Transmission Provider Tariff Provisions As Concerns Regional Transmission Planning And Cost Allocation And Incumbent Utility Rights And Obligations – Which Do Not Include A Right-Sizing Monopoly Preference – Are Unjust, Unreasonable, And Unduly Discriminatory Or Preferential.

Under Section 206 of the FPA, the Commission may determine that an existing rate is unjust, unreasonable, unduly discriminatory or preferential; however, "[o]nly *after* having made the determination that the utility's existing rate fails that test may FERC exercise its section 206 authority to impose a new rate."[21] The Competition Coalition challenges the absence of specific findings under the first prong of Section 206 (and challenges FERC's generic findings to the extent that FERC leverages generic findings) as to the precise existing transmission provider tariff provisions that are unjust, unreasonable, unduly discriminatory or preferential under Section 206. Specifically, Order No. 1920 makes no findings that the existing tariff framework of incumbent public utility rights and responsibilities related to regionally planned and regionally cost allocated transmission additions produces transmission rates that are unjust, unreasonable, and unduly discriminatory.[22] Of particular concern, Order No. 1920 made no finding that the absence of an incumbent preference for regional projects that would supplant the need for a locally planned

[20] *Id.* (citing *Fla. Gas Transmission*, 876 F.2d at 45); *see also Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 16 (D.C. Cir. 2005).

[21] *Emera Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017).

[22] *See* Order No. 1920 at PP 1568-1569.

replacement of aging transmission facilities is unjust, unreasonable, unduly discriminatory, or preferential.[23]

Pursuant to FPA Section 206, the Commission must find, and provide substantial evidence supporting its finding, that existing rates are unjust, unreasonable, unduly discriminatory or preferential.[24] Section 206 instructs the Commission to remedy "any . . . practice" that "affect[s]" a rate for interstate electricity transmission services demanded or charged by any public utility if such practice "is unjust, unreasonable, unduly discriminatory or preferential."[25] "Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate."[26] FERC cannot rely on the remedy to show that the *status quo* is not just and reasonable. FERC must find, as a first step in the analysis and <u>independently</u> of any remedy, that existing tariffs are unjust, unreasonable, unduly discriminatory or preferential.[27] As the U.S. Court of Appeals for the D.C. Circuit has explained:

> In other words, a finding that an existing rate is unjust and unreasonable is the "condition precedent" to FERC's exercise of its section 206 authority to change that rate. [] Section 206 therefore imposes a "dual burden" on FERC. [] Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate.[28]

Section 206 mandates a two-step procedure whereby FERC must first "make an explicit finding that the existing rate is unlawful before setting a new rate."[29]

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[23] Order No. 1920 at P 1576 ("we clarify that the Commission is not finding that existing transmission planning processes are unjust, unreasonable, or unduly discriminatory or preferential due to a lack of a federal right of first refusal for these facilities.")

[24] 16 U.S.C. § 824e(a).

[25] 16 U.S.C. § 824e(a).

[26] *Emera Maine v. FERC*, 854 F.3d at 25.

[27] *Emera Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017).

[28] *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017). (citations omitted).

[29] *Pub. Serv. Elec. & Gas v. FERC*, 989 F.3d 10, 13 (D.C. Cir. 2021) (quoting *Emera Maine*, 854 F.3d at 24).

While the rulemaking record may be extensive, the Commission in the Final Rule does not support its finding (and the record does not contain any evidence) that existing regional transmission planning processes and tariff practices are resulting in unjust, unreasonable, unduly discriminatory, or preferential Commission-jurisdictional regional transmission rates because incumbent public utilities do not possess a right-sizing monopoly preference. In fact, Order No. 1920 suggests that it is not the regional planning tariffs but, instead, the local planning tariffs that are unjust, unreasonable, unduly discriminatory, or preferential. In fact, Order No. 1920 concluded that those local planning provisions result in "the transmission provider hold[ing] the leverage as to whether to build a right-sized replacement transmission facility or a less efficient in-kind replacement transmission facility . . .."[30] Yet FERC was clear that it was not asserting that those local planning processes formed the basis for its action, stating "[t]o be clear, our findings here are not intended to call into question the justness and reasonableness of either generator interconnection processes or local transmission planning processes, which each serve important roles in ensuring reliability and integrating new resources onto the transmission system."[31] The Commission went on to note that "the trends regarding use of these [local planning and generation interconnection] processes, as well as in-kind replacement processes, provide additional evidence *to support our finding that existing regional transmission planning and cost allocation requirements are inadequate without reform.*"[32]

Order No. 1920 failed to identify the specific regional transmission planning and cost allocation tariff requirements, particularly as they relate to in-kind replacement processes, that are

[30] Order No. 1920 at P 1706.

[31] *Id*. at P 111.

[32] *Id*. (emphasis added).

unjust, unreasonable, unduly discriminatory or preferential as a result of the lack of an incumbent preference. The only identified concern – the lack of transparency in local planning as an input to regional planning – has nothing to do with the lack of a preference in the regional planning tariffs and is fully addressed by other requirements of Order 1920. Nevertheless, in its declaration that Section 206 allows it to act, Order No. 1920 seems to take the position that if it finds *any* tariff provision unjust and unreasonable, it can modify *any other* tariff provision notwithstanding that such provision is just and reasonable, or was not found to be unjust, unreasonable, unduly discriminatory or preferential. There is no statutory or judicial support for such a broad reading of the requirement under the first prong of Section 206 of the Federal Power Act.

The absence of any nexus in Order No. 1920 between the only identified problem constituting the Commission's claim that existing regional tariffs are unjust and unreasonable, and the prescribed remedy is glaring as concerns the right-sizing monopoly preference. In identifying the problem to be addressed with the interrelationship between local and regional planning, Order No. 1920 highlights the Commission's concerns in the NOPR that "local transmission planning processes may lack adequate provisions for transparency and meaningful input from stakeholders, and that regional transmission planning processes may not adequately coordinate with local transmission planning processes."[33] However, Order No. 1920 again specifically ruled that requests to address deficiencies in the local planning processes, like the requests from the Competition Coalition and other parties,[34] were rejected because "the Commission in the NOPR

[33] Order No. 1920 at P 1565 (citing NOPR, 179 FERC ¶ 61,028 at P 389 & n. 639)

[34] *See* Comments of the Electricity Transmission Competition Coalition at 7-9, 12-15, 19, 38, 61, 66-70; Comments of LS Power Grid, LLC at 5, 7, 9-12, 15-16, 19, 24, 37-52, 60-61, 77-86, 92, 109, 135-148; Comments of NextEra Energy, Inc. at 98-101; Initial Comments of California Public Utilities Commission at 2-3, 9, 12-16; Comments of American Municipal Power, Inc. at 24-32; *see also* Comments of LS Power Grid, LLC to ANOPR at 32-84; NOPR at P 393.

did not propose other changes to local transmission planning processes and therefore these requests are beyond the scope of this final rule."[35] Order No. 1920 sows further confusion by intermingling regional planning processes and local planning processes by concluding:

> we find that there is substantial evidence to support the conclusion that existing requirements governing transparency in local transmission planning processes and coordination between local and regional transmission planning processes are unjust, unreasonable, and unduly discriminatory or preferential. We therefore adopt the preliminary findings in the NOPR concerning the need for reform of the local transmission planning process and coordination between the local and regional transmission planning processes, including the evaluation of whether replacement transmission facilities could be modified (i.e., right-sized) to more efficiently or cost-effectively address transmission needs.[36]

Order No. 1920 contends that it is not making any changes to local planning processes, yet finds that a lack of transparency in local planning is unjust and unreasonable, and that the lack of transparency and coordination between local planning and regional planning supports the Commission authorizing a wholly unrelated right-sizing ROFR or Monopoly Preference for new projects addressing Long-Term Transmission Needs that eliminate the need for a proposed "in-kind replacement" of an existing transmission facility. However, Order No. 1920 does not elaborate on, much less support with substantial evidence, its reference to "coordination" in the context of its first prong Section 206 "finding." Order No. 1920 does not identify any specific aspect of the interrelationship between local and regional planning that, in its view, yields unjust, unreasonable, or unduly discriminatory rates. Order No. 1920's finding, in this specific regard, is not supported by substantial evidence and does not reflect sufficiently in-depth or reasoned decision-making.

[35] Order No. 1920 at P 247.

[36] Order No. 1920 at P 1569 (emphasis added).

Order No. 1920 asserts a belief in discussing Section 206 remedies that a right-sizing monopoly preference is needed because

> the lack of a requirement for transmission providers in each transmission planning region to evaluate whether those replacement transmission facilities could be modified (i.e., right-sized) to more efficiently or cost-effectively address Long-Term Transmission Needs results in a regional transmission planning process that fails to identify opportunities to right-size planned in-kind replacement transmission facilities and may result in the development of inefficiently sized or designed, duplicative, or unnecessary transmission facilities that increase costs to customers and render Commission-jurisdictional rates unjust and unreasonable.[37]

Instead of making any specific findings under the first prong of Section 206 that certain aspects of the existing interplay between local and regional planning practices in existing transmission provider tariff provisions produce rates that are unjust and unreasonable, Order No. 1920 skips directly to a preferred remedy – the right-sizing Monopoly Preference – in an attempt to backfill the required first prong finding under Section 206.

Order No. 1920 fails to provide substantial evidence (*i.e.*, specific facts, findings, and data) that the existing regional planning framework as it relates to incumbent public utility preferences for regionally planned, regionally cost allocated projects in existing transmission provider tariff provisions is unjust, unreasonable, or unduly discriminatory or preferential. Given that Order No. 1000,[38] as upheld by the appellate courts, expressly determined that monopoly preferences for incumbent utilities in regional transmission planning are not just and reasonable and thus violate the FPA,[39] the Commission has a clear obligation, if not a heightened obligation, under the first prong of Section 206 to demonstrate that the existing framework for regional transmission

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[37] Order No. 1920 at P 1574.

[38] Order No. 1000 – A at P 426 ("there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others.")

[39] *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 334 (7th Cir. 2016).

planning, which does not include an incumbent right-sizing preference for regional transmission facilities, is not just and reasonable. The Commission did not make that finding. In fact, Order No. 1920 reached exactly the opposite conclusion: "we clarify that the Commission is not finding that existing transmission planning processes are unjust, unreasonable, or unduly discriminatory or preferential due to a lack of a federal right of first refusal for these facilities."[40] Order No. 1920's failure to make the requisite Section 206 first prong finding, coupled with a specific statement that Order No. 1920 is not making that requisite finding, is error that warrants rehearing.

The Competition Coalition recognizes and appreciates that reducing the number of locally planned transmission projects and increasing the number of regional plan projects is necessary.[41] Order No. 1920 provides reasonable rationale behind "right-sizing": facilitating the identification of locally planned transmission projects or projects under 200 kV that can be modified or "right-sized" to more efficiently or cost effectively address regional transmission needs.[42] The Commission explained that existing transmission provider tariffs are unjust and unreasonable "due to the lack of right-sizing requirements that may lead to the identification, evaluation, and selection of more efficient or cost-effective Long-Term Regional Transmission Facilities."[43] In this limited regard, the Commission explained its reforms to enhance transparency of the local planning process inputs into the regional planning process to allow evaluation of whether locally planned replacement transmission facilities can be "right-sized" to address broader regional needs.[44] And so Order No. 1920 provides some support for the concept of "right-sizing." But Order No. 1920

[40] Order No. 1920 at P 1576.

[41] *See* Comments of the Electricity Transmission Competition Coalition at 7-9, 12-15, 19, 38, 61, 66-70.

[42] *See* Order No. 1920 at P 1574.

[43] Order No. 1920 at P 1576.

[44] Order No. 1920 at P 1577; *see id.* at P 1650, n. 3613 (explaining the process for "right-sizing" projects).

fails entirely to demonstrate that the existing framework of rights and obligations for incumbent public utilities related to regionally planned and regionally cost allocated projects in existing transmission provider tariffs is unjust, unreasonable, unduly discriminatory or preferential.

Order No. 1920 states that the Commission "disagree[d] with LS Power, Competition Coalition, and NextEra's arguments" that the NOPR did not demonstrate that FERC met its burden under Section 206 to show "that existing rates are unjust, unreasonable, or unduly discriminatory or preferential in instituting a federal right of first refusal for right-sized replacement transmission facilities."[45] However, the Commission did not engage the arguments of the Competition Coalition or the arguments of the non-incumbent transmission developers that it must make that specific Section 206 finding before proceeding to address the proposed remedy. The Commission majority confirmed its failure to engage the arguments[46] regarding the first prong of Section 206 by asserting that "[w]e address LS Power, NextEra, and other commenters' concerns regarding the Commission's proposed replacement rate, including our findings regarding a federal right of first refusal for right-sized replacement transmission facilities, below." The point of the argument, as shown by Order No. 1920's own characterization is that the Commission cannot proceed to a remedy until it meets the first prong of Section 206. Mere expression of disagreement and dismissing contrary evidence "with little more than a hand wave" does not constitute reasoned decision-making.[47]

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[45] Order No. 1920 at P 1576 (emphasis added) (citing Competition Coalition Initial Comments at 64; LS Power Initial Comments at 51-53; NextEra Initial Comments at 54-56); *see also* Order No. 1920 (recognizing arguments that the NOPR failed to satisfy the first prong of Section 206 "to make an affirmative finding that either the regional transmission planning process or the local transmission planning process are unjust and unreasonable such that abandonment of the existing tariff provisions is warranted").

[46] *TransCanada Power Mktg. Ltd. v. Fed. Energy Regul. Comm'n*, 811 F.3d 1,12 (D.C. Cir. 2015) ( an agency must "respond meaningfully to the arguments raised before it"(quoting *Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005)) (quotations omitted).

[47] *See Del. Div. of Pub. Advocate v. FERC*, 3 F.4th 461, 469 (D.C. Cir. 2021).

Instead of providing a logical basis for a finding that existing regional practices prohibiting incumbent preferences for regionally planned and regionally cost allocated transmission additions are unjust, unreasonable, unduly discriminatory, or preferential under the first prong of Section 206, Order No. 1920 found that "permitting a federal right of first refusal for right-sized replacement facilities will encourage transmission providers to provide their best in-kind replacement estimates" and "remove a disincentive for transmission providers to consider right-sizing in Long-Term Regional Transmission Planning."[48] These speculative assertions about Order No. 1920's proposed remedy are problematic on their own (as discussed *infra*), but they provide no basis for Order No. 1920 satisfying the first prong requirement of Section 206. Further, Order No. 1920 adopts the Monopoly Preference for right-sized projects that replace the need for a locally planned project based on a perception that "the transmission provider would prefer the assurance of a federal right of first refusal for the in-kind replacement transmission facility over the uncertainty of subjecting a right-sized replacement transmission facility to the Order No. 1000 competitive transmission development" and because "the transmission provider holds the leverage as to whether to build a right-sized replacement transmission facility or a less efficient in-kind replacement transmission facility, the establishment of the federal right of first refusal is necessary to effectuate this reform and ensure that Commission-jurisdictional rates are just and reasonable."[49] Again, Ordre No. 1920 does not cite to any specific record evidence to support these assertions or cite to any specific tariff provisions that cause the problem and, in any event, they speak to the second prong of Section 206 but not the first. As the Court firmly held in *Emera Maine*, "only after

[48] Order No. 1920 at P 1703.

[49] Order No. 1920 at P 1706.

having made the determination that the utility's existing rate fails that test may FERC exercise its section 206 authority to impose a new rate."[50]

Regarding Order No. 1920's rationale for implementing the "right-sizing ROFR," the Commission explains:

> we find that permitting a federal right of first refusal for right-sized replacement transmission facilities will encourage transmission providers to provide their best in-kind replacement estimates, because they will have certainty that they will not lose the opportunity to invest in any in-kind replacement transmission facility that is then selected as a right-sized replacement transmission facility.[51]

Order No. 1920 fails to demonstrate that providing incumbent public utilities "certainty that they will not lose the opportunity to invest in any in-kind replacement transmission facility" is remedial because Order No. 1920 fails in its threshold step – finding that the existing framework of incumbent transmission owner rights and obligations in existing transmission provider tariff provisions is unjust, unreasonable, or unduly discriminatory. Order No. 1920's statements in support of implementing the right-sizing Monopoly Preference do not cite to any data or record evidence, much less evidence of an existing problem that would justify such an onerous remedy.[52] LS Power succinctly summarized the implicit rationale for implementing the right-sizing ROFR: "'we find that we have no control over incumbent transmission owners' local planning so we must capitulate to their ransom demands and grant them the right to develop regional projects without

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[50] *Emera Maine*, 854 F. 3d at 21. The Court found there that FERC improperly used its preferred remedy to justify its conclusion on the first prong of the Section 206 analysis. ("Specifically, Transmission Owners contend that, rather than first finding that their existing base ROE was unjust and unreasonable, FERC began by determining that 10.57 percent would be a just and reasonable base ROE and only then found the existing 11.14 percent ROE to be unlawful because it was not equivalent to 10.57 percent. FERC does not actually challenge Transmission Owners' description of its process. Rather, it argues that its determination of a new just and reasonable base ROE was "sufficient" by itself to prove that the existing base ROE was unjust and unreasonable. See Resp't Br. 28–29. We conclude that FERC did not meet the first requirement of section 206 that it demonstrate the unlawfulness of Transmission Owners' base ROE.") *Id*. at 22.

[51] Order No. 1920, P 1703.

[52] *See* Order No. 1920 at PP 1702-1709.

competition."[53] However, Order No. 1920 did not engage LS Power's contention or adopt it as a determination to support a first prong Section 206 finding that deficiencies in the existing framework of transmission owner rights and obligations in transmission provider tariffs make those provisions unjust, unreasonable, unduly discriminatory, or preferential.

Order No. 1920 is also based on the repeated assertion that "a transmission provider may have existing rights and responsibilities with respect to maintaining and, when necessary, replacing their transmission facilities."[54] However, Order No. 1920 stops far short of identifying these rights and responsibilities, recounting how they arose, and explaining how they have become problematic since Order No. 1000 to such a degree that they produce existing regional transmission planning rates that are unjust, unreasonable, or unduly discriminatory under Section 206. That is what the first prong of Section 206, and the substantial evidence and reasoned decision-making obligations, require from the Commission. And that is what Order No. 1920 fails to accomplish. Because Order No. 1920 fails to meet the necessary and critical initial burden of demonstrating that the existing framework of rights and responsibilities of incumbent public utilities in transmission provider tariffs produces rates that are unjust, unreasonable, and unduly discriminatory, Order No. 1920 is arbitrary and capricious and rehearing is warranted.

### B. Error #2: The Federal Power Act Does Not Authorize The Commission To Mandate A Transmission Monopoly To Existing Transmission Owners For Future Projects; Thus, Order No. 1920 Exceeded Commission Statutory Authority

As discussed in Error No. 1 above, the Commission's decision in Order No. 1920 to mandate that an incumbent transmission owner have an exclusive right to develop new regionally planned right-sized transmission facilities fails to meet the first prong of Section 206. But even if

[53] LS Power Initial Comments at 54.

[54] Order No. 1920 at PP 1651, 1677, 1687, 1689, 1706.

the Commission had, or could, meet the first prong of Section 206, the replacement rate chosen must be just and reasonable, which necessarily requires that the Commission act within the authority granted by the FPA. While the Competition Coalition disputes that the Commission has or can establish that the proposed rate is a just and reasonable replacement rate (see Error Nos. 3 and 4), the Commission cannot get even that far because mandating any form of a "federal right of first refusal" exceeds the Commission's authority under the Federal Power Act.

The Final Rule *mandates* that a federal monopoly be created in favor of an existing transmission owner for "any portion of the right-sized replacement facility located within that transmission provider's retail distribution service territory or footprint . . .."[55] The Commission cannot mask what it is doing in Order No. 1920 by referring to the Monopoly Preference as a "federal right of first refusal" rather than the monopoly or effective franchise that it is as the Commission already clarified that such preferences are effective monopolies, holding "there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others."[56] "As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'"[57] Simply put, the FPA provides the Commission no authority to award the equivalent of a federal franchise or otherwise grant monopoly rights to an existing transmission owner to develop future

[55] Order No. 1920 at P 1702.

[56] Order No. 1000 – A at P 426.

[57] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) *citing Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001) (emphasis added).

new electric transmission[58] in interstate commerce, whether based on the existence of a retail service territory, existing transmission assets, or any other fact. Indeed, the Commission made no effort to cite any such FPA authority in the Final Rule. When "there is no statute conferring authority, FERC has none."[59] In the absence of statutory authorization for its act, an agency's "action is plainly contrary to law and cannot stand."[60]

Because the Commission's mandate in Order No. 1920 that existing transmission owners be granted a "federal right" to build future right-sized replacement facilities is beyond the Commission's authority under the Federal Power Act, the proposed "federal right of first refusal" provided to incumbent transmission owners to develop right-sized projects is an unlawful effort to expand FERC authority beyond the statutory grant.[61] In the 90 year history of the FPA, Congress has expressed no intent that FERC, or its predecessor, should or could extend state or local retail service territories into a perpetual federal franchise for electric transmission in interstate commerce.[62] The entire purpose of the FPA was to ensure that matters impacting the national economy regarding electric transmission were addressed at a national level because they were

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[58] The Commission confirmed the application of the Monopoly Preference for future projects, noting: "a right-sized replacement transmission facility is, for purposes of this right-sizing reform, *a new transmission facility that*: (1) would meet the need to replace an existing transmission facility that a transmission provider has identified in its in-kind replacement estimate as one that it plans to replace with an in-kind replacement transmission facility while also addressing a Long-Term Transmission Need; (2) results in more than an incidental increase in the capacity of an existing transmission facility that a transmission provider has identified for replacement in its in-kind replacement estimate; and (3) is located in the same general route as, and/or uses or expands the existing rights-of-way of, the existing transmission facility that a transmission provider has identified for replacement in its in-kind replacement estimate." Order No. 1920 P 1702, fn 3613 (emphasis added).

[59] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) *citing Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001) (emphasis added); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (recognizing that "an agency literally has no power to act ... unless and until Congress confers power upon it").

[60] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) *citing Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001) (*citing American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119–20 (D.C.Cir.1995) ("API"); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995)).

[61] *W. Va. V. EPA*, 597 U.S. 697 (2022).

[62] *N.Y. v. FERC*, 535 U. S. 1, 5-6 (2002) (recounting history of the FPA).

beyond the reach of state law.[63] Yet Order No. 1920 seeks to translate a state or local retail franchise into a federal franchise for transmission in interstate commerce. The only section of the Federal Power Act cited in Order No. 1920 as a basis for any Commission action, Section 206, not only does not provide such broad authority, but its language and prior application, indicate an exact opposite Congressional intent.

While the Commission has broad authority under Section 206 of the FPA to set just and reasonable transmission rates, that authority does not extend to granting a federal preference. Section 206 specifically requires that if FERC finds a rate or practice affecting a rate to be "unjust, unreasonable, *unduly discriminatory or preferential*, the Commission shall determine the just and reasonable rate . . .."[64] As discussed below, the Commission has found incumbent transmission owner preferences both unjust and unreasonable **and** unduly discriminatory or preferential. Because Congress mandated that FERC correct any rate that is unduly discriminatory or preferential, Congress could not have intended the language allowing FERC to set the just and reasonable replacement rate after it makes that finding to permit FERC to *mandate* the creation of a facially discriminatory and preferential right-sizing federal preference as the replacement rate.

This conclusion is supported by the history of the preferential tariff provisions the Commission seeks to resurrect through Order No. 1920. In mandating a "federal right of first refusal" for existing transmission owners for future right-sized replacement projects, the Commission overlooked or ignored where the phrase "federal right of first refusal" came from, why the FPA *required* the Commission to banish such preferences more than a decade ago, and

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[63] *Public Util. Comm'n of R. I. v. Attleboro Steam & Elec. Co.*, 273 U. S. 83, 89 (1927); *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 533 (1945)("once a company is properly found to be a 'public utility' under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions.")

[64] 16 U.S. Code § 824e (emphasis added).

most importantly why the Commission has no statutory authority to mandate the creation of a federal preference now. The history of the phrase, the Commission's prior actions, and judicial precedent demonstrate not only that "federal rights of first refusal" are antithetical to the FPA when proposed under Section 205, but also that there is no historical or statutory support for the proposition that the Commission has the authority to mandate the creation of such a preference under Section 206, or any other section, of the FPA.

### 1. The Phrase "Federal Right Of First Refusal" Is A Made-Up Phrase That Has No History In The Federal Power Act.

As an initial matter, to understand the fallacy of Order No. 1920's mandated ROFR or Monopoly Preference, it is important to first recognize that the phrase "federal right of first refusal" as used in the Final Rule has no direct reference in the FPA. Instead, the phrase was nothing more than a made-up general reference for clauses in FERC-jurisdictional contracts or tariffs implemented by existing transmission owners to impede independent transmission developers seeking to develop cost-of-service transmission. The nonsensical phrase has taken on a life of its own as a result of the Commission's continued use of it.

The phrase "right of first refusal" arose, without the "federal" precedent clause, as merely a short-handed reference to various tariff or contract provisions that mandated that incumbent transmission owners in a region have the right to build new regionally planned transmission projects.[65] When transmission owners entered into independent system operator or regional

[65] Although not dispositive of this rehearing discussion as to the Commission's lack of authority to grant a preference, "right of first refusal" is generally a misnomer as the provisions were largely a straight project assignment preference rather than an option for a transmission owner to build, or not, at its choosing a project selected in regional planning. *See, e.g.*, Comments of PSE&G Companies, filed November 23, 2009, in Docket No. AD09-8-000 at 15 ("[i]n many organized markets, transmission owners have the right of first refusal to build transmission in their service territory. . . . *Transmission owners, who have transferred authority to an RTO to plan their facilities, must build the transmission projects that the RTO identifies through its transmission planning process.*") (emphasis added). The Competition Coalition is unaware of any instance in which the so-called right of first refusal has been declined.

transmission operator arrangements, in their initial contract or tariff filings, made under Section 205 of the FPA, they agreed among themselves to divide the market for *future* transmission additions.[66]

In 2009, when the Commission began exploring the negative impact of those self-granted preferences on transmission development and Commission jurisdictional transmission rates, it referred to those provisions merely as rights of first refusal, without the reference to "federal."[67] Of relevance to the instant rehearing, in seeking comments following the series of regional technical conferences on transmission planning, the Commission sought input on the two issues relevant to this rehearing request and the "right-sizing" ROFR or Monopoly Preference:

- Should prospective transmission developers coordinate their projects in the interest of "right-sizing" facilities to make the best possible use of available corridors and minimize environmental impacts? If so, what process should govern the identification and selection of projects that affect multiple systems?[68]

- Do rights of first refusal for incumbent transmission owners unreasonably impede the development of merchant and independent transmission? If so, how can this impediment be addressed?[69]

Equally important, in defending their self-granted preference to build all future transmission development, the incumbent transmission owners did not reference the grant of any

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[66] *PJM Interconnection, L.L.C.*, 96 FERC 61,061 (2001) at 30; *Midwest Independent Transmission System Operator, Inc.*, 97 FERC 61, 326 (2001) at 42-43; *Sw. Power Pool, Inc.*, 89 FERC ¶ 61,284 (1999); *ISO New England, Inc., et al. Bangor Hydro-Elec. Co., et al. the Consumers of New England*, 109 FERC ¶ 61,147 (2004). The Commission also rejected proposals for inclusion of such preferences. S*ee, e.g.*, *Cleco Power LLC*, 101 FERC ¶ 61,008 at P 117 (2002), order terminating proceedings, 112 FERC ¶ 61,069 (2005); *Avista Corp. et al.*, 100 FERC ¶ 61,297, at P 47 (2002); *Carolina Power & Light Co.*, 94 FERC ¶61,273, 62,010 (2001) (rejecting proposed preference as part of GridSouth RTO formation).

[67] *See*, *e.g.*, "• What impact does a right of first refusal for incumbent transmission owners have on transmission development and cost allocation methods?" Panel 4 – Examining Coordination and Comparability, Panelist List and Final Agenda for the Atlanta, Georgia Technical Conference September 10, 2009, Regional Technical Conferences Assessing the Order No. 890 Planning Processes, AD09-08-000.

[68] Notice Of Requests For Comments, Transmission Planning ProcessesUnder Order No. 890, Docket No. AD09-8-000, October 8, 2009 at 3.

[69] *Id*. at 4.

"federal" right as creating the preference, but instead referenced their own contractual agreements, filed under Section 205, to divide the market when entering into a regional transmission organization ("RTO") arrangement. Those transmission owners argued that the Commission was prohibited from taking away those self-granted preferences. For example, the MISO transmission owners asserted:

> Challenges to the right of first refusal to build new transmission are *contrary to the provisions of the Midwest ISO Agreement* and threaten the foundation upon which the Midwest ISO was established. Furthermore, eliminating the right of first refusal for transmission owners that are members of an RTO would put those transmission owners at a financial disadvantage compared to non-RTO transmission owners who retain this right. This would provide a disincentive to new members considering joining an RTO and could cause existing transmission owners to reevaluate their continued membership in RTOs.[70]

Although PPL Electric Utilities Corporation ("PPL") referred to the PJM provision as "a backstop obligation to build transmission projects"[71] the purpose of the provision in PJM was the same, ensuring retention of incumbent transmission owners' claim to the right to build all future transmission projects. In this regard, PPL noted:

> Establishing requirements that would change PJM's policy under its Operating Agreement would reduce the current effectiveness of the RTEP process for constructing new transmission and would unfairly overturn a policy on which PJM members – including PPL Electric – relied upon when formulating the RTEP process for the region.[72]

The Edison Electric Institute ("EEI"), crystalized the fact that the incumbent preference was not based on a requirement of the FPA, or even a right inherent in those statutory provisions, but

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[70] Post-Technical Conference Comments of The Midwest ISO Transmission Owners, filed November 23, 2009 in Docket No. AD09-8-000 (emphasis added).

[71] Comments of PPL Electric Utilities Corporation, filed November 23, 2009 in AD09-8-000, at 6, *citing* PJM Operating Agreement, Schedule 6, § 1.7: "Obligation to Build."

[72] *Id*. at 7.

instead on existing transmission owners' self-serving view that they are best situated to develop new transmission:

> In many cases, EEI believes that incumbent transmission owners are better situated to build needed transmission *within their franchised service territories*. EEI emphasizes that the incumbent transmission owner, including those in an RTO or ISO, has reliability obligations and is subject to penalties for failure to comply. EEI notes further that the incumbent transmission owner has considerable design and operational experience with its system; established customer relationships and knowledge of their needs; knowledge of property owners within its system; and significant experience with state and local permitting and siting.[73]

EEI's reference to "franchised service territory" of course refers to state or locally granted *retail* electric franchises, as there are no federal franchise service territories. Again, missing from EEI's comments is any suggestion that Congress intended an extension of these retail service territories into federal monopoly territories through the FPA. Xcel Energy clarified this point by asserting that: "[w]hile some may couch the right as an unfair advantage, it is instead a fundamental and reasonable part of the entire bundle of rights and important public service obligations that attach to an incumbent transmission provider's provision of utility service *within its state-franchised service territory*, where it has an obligation (not an option) to provide reliable service at the lowest reasonable cost."[74] As the U.S. Supreme Court has noted, as it relates to transmission in interstate commerce, the Federal Power Act "perfectly clear that the original FPA did a good deal more than

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[73] Comments of Edison Electric Institute, filed November 23, 2009 in Docket No. AD09-8-000, at 9-10 (emphasis added). Of course the projection as to the ability to incumbent transmission owners to compete has not proven accurate, which is the reason 15 years later that the incumbent transmission owners continue to advocate for preferences. *See* ANOPR Comments of Electricity Transmission Competition Coalition, filed in RM21-17-000 at pp 5-22; LS Power Grid, LLC ANOPR comments filed in RM21-17-000, Appendix II.

[74] Post Technical Conference Comments of Xcel Energy Services Inc., filed November 23, 2009 in Docket No. AD09-8-000, at 15. Xcel reiterated the same assertions as EEI related to incumbent's claimed superior transmission development standing, a fact that has not proven accurate. Indeed, the inaccuracy of the incumbent's assertions as to their likely success in transmission competition is precisely why they have eschewed regional planning, including right-sizing.

close the gap in state power identified in *Attleboro*."[75] Congress granted FERC authority over electric transmission acknowledging that electric transmission inherently is not "within [a] state-franchised service territory" but instead is in interstate commerce.[76]

It appears that the Commission first used the full phrase "federal right of first refusal" in its Notice of Proposed Rulemaking in RM10-23-000 where it proposed to require that "a right of first refusal that is created by a document subject to the Commission's jurisdiction and that provides an incumbent utility with *an undue advantage over nonincumbent transmission project developers* is removed from that document."[77] There, the Commission first noted that "[a] right of first refusal is defined, for the purposes of this proposed rulemaking, as the right of an incumbent transmission owner to construct, own, and propose cost recovery for any new transmission project that is: (1) located within its service territory; and (2) approved for inclusion in a transmission plan developed through the Order No. 890 planning process."[78] The Commission went on to offer that "with respect to facilities that are included in a regional transmission plan, we propose to require removal from a transmission provider's OATT or agreements subject to the Commission's jurisdiction provisions that establish a *federal* right of first refusal for an incumbent transmission provider."[79] Here, the reference to "federal" was merely to distinguish preferences included in agreements subject to Commission jurisdiction, or similar tariffs, from preferences arising in other

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[75] *New York. V. FERC*, 534 U.S. 1, 21 (2002).

[76] *Id*. at 7, citing Brief for Respondent FERC 4-5 explaining "In the rest of the country, any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." See also, *In re Florida Power & Light Co.*, 37 F.P.C. 544, 549 (1967), *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 469 (1972).

[77] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Notice of Proposed Rulemaking, RM10-23-000, issued June 17, 2010 at P 4 ("RM10-23 NOPR") (emphasis added).

[78] RM10-23 NOPR at P 20, fn 21.

[79] RM10-23 NOPR at P 93 (emphasis added).

contexts, if any actually existed at the time. The Commission made this clear in Order No. 1000, noting that "the Commission purposely refers to 'federal rights of first refusal' in this Final Rule because the Commission's action on this issue in this Final Rule addresses only rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements."[80] Thus, preceding the phrase "right of first refusal" with the word "federal" adds nothing to suggest that such preference provisions had federal statutory support or somehow reflected a "federal right."

### 2. FERC Found That The Federal Power Act Required Removal Of Most "Federal Rights Of First Refusal".

In Order No. 1000 and subsequent Orders, the Commission required elimination of incumbent preferences for projects included in the regional plan for purposes of cost allocation, a requirement that would include the so-called right-sizing projects. In Order No. 1000, the Commission reiterated that it undertook the inquiry because "Order No. 890 did not specifically address the potential for, or effect of, *undue preference to incumbent utilities over nonincumbent transmission developers* through practices applied within transmission planning processes."[81] As discussed above, for FERC to act under Section 206 it must find that the existing rate is unlawful.[82] FERC made the finding that rights of first refusal were unlawful with respect to transmission additions for which regional cost allocation was provided, finding in Order No. 1000 that:

> there is a need to act at this time to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation. Failure to do so would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in

[80] Order No. 1000 at P 253, fn 231.

[81] Order No. 1000 at P 228 (emphasis added).

[82] *Emera Maine v. FERC*, 854 F.3d 9, (D.C. Cir. 2017) ("The FPA, by requiring FERC to show that an existing rate is unlawful before ordering a new rate under section 206, provides a form of "statutory protection" to a utility."

> rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers.[83]

As noted above, in Order No. 1000–A, specifically addressing the replacement of entire transmission facilities that FERC now addresses, the Commission declared "there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others."[84]

Importantly, Order No. 1000 recounted the myriad arguments raised by incumbent transmission owners regarding the proposed removal of self-granted preferences.[85] There was no suggestion in the incumbent comments leading up to Order No. 1000 that the FPA contemplated the Commission granting federal franchises for transmission in interstate commerce. Likewise, the rehearing arguments of existing transmission owners focused on arguments that the Commission was prohibited from addressing the self-granted preferences, either because they did not address matters closely connected enough with transmission rates,[86] that claims of undue discrimination or preferential treatment are not relevant as those claims only apply to customers,[87] or because the Commission had not made a sufficient showing under Section 206 that an existing rate was unjust and unreasonable. In rejecting those arguments, of relevance to the instant effort of Order No. 1920 to mandate the creation of a new federal preference, the Commission addressed and dismissed the arguments that it could not remove the self-granted preference by stating:

> In addition to affirming our decision to act to remedy unjust and unreasonable rates, *we affirm, on an independent and alternative basis, the decision in Order No. 1000 that the elimination of any*

[83] Order No. 1000 at P 253.

[84] Order No. 1000-A at P 426.

[85] Order No. 1000 at PP 239–251.

[86] Order No. 1000A at PP 346–348.

[87] *Id*. at PP 351–353.

> *federal rights of first refusal from Commission-jurisdictional tariffs and agreements is necessary to address opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers within regional transmission planning processes.* In Order No. 1000, the Commission explained that "it has a responsibility to consider anticompetitive practices and to eliminate barriers to competition." *We continue to believe*, as the Commission found in Order No. 1000, that *we have a duty to consider anticompetitive practices and to eliminate barriers to competition consistent with the FPA.*[88]

Finally, demonstrating the inconsistency between the limits of the Federal Power Act and the Commission's current effort to mandate an incumbent preference through so-called rights of first refusal and the limits of the FPA, the Commission rejected efforts to protect the self-granted contractual preferences based on the assertion that the Commission had not met the higher standard for contract abolition. In doing so the Commission found that the contractual preference provisions were not entitled to protection as they severely harmed the public interest.[89] The United States Court of Appeals for the D.C. Circuit upheld the Commission's finding that rights of first refusal provisions severely harm the public interest.[90] In upholding the Commission, related to different region's preference provision, the D.C. Circuit cited with approval the finding of the United States Court of Appeals for the Seventh Circuit that preference provisions were cartel-like, noting:

> The Seventh Circuit has gone so far as to describe such self-protective and anti-competitive agreements as cartel-like. *See MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016). We similarly think that such terms through 'which the parties are seeking to protect themselves from competition from third parties' are a far cry from those in the original Mobile-Sierra cases.[91]

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[88] *Id*. at P 361 (emphasis added) (footnotes omitted).

[89] *ISO New England Inc.*, 143 FERC ¶ 61,150, P 172 (May 17, 2013).

[90] *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

[91] *Oklahoma Gas & Electric Co. v. FERC*, 827 F.3d 75, 80 (D.C. Cir. 2016).

If monopoly preference provisions, initially offered under Section 205 of the FPA, are so antithetical to the FPA that they cannot withstand even the heightened contract review, there is no support for an assumption that the Commission enjoys Congressionally granted authority to simply create a federally sanctioned "cartel-like" monopoly preference.

### 3. Order No. 1920's Mandated Incumbent Preference Exceeds The Commission's Authority.

The record in RM21-17-000 overwhelmingly established that incumbent transmission owners have, for over a decade, stymied regional transmission planning, including so-called right-sizing of their individually planned transmission facilities, all to ensure that the incumbent transmission owners' investors' financial interests are protected.[92] Order No. 1920 recognized that those transmission owners will continue to operate in their investors' interest, instead of in consumers' interest, by alleging that "absent a federal right of first refusal, *we believe the incumbent transmission provider* whose in-kind replacement transmission facility is selected to be right-sized *would likely proceed to develop the less efficient or cost-effective in-kind replacement transmission facility*."[93] Of course, existing transmission owners operating in the interest of their individual investors is not a surprise, as the Commission has recognized that FACT in each of its major transmission orders: "As the Commission recognized in Order Nos. 888 and 890, it is not in the economic self-interest of public utility transmission providers to expand the grid to permit access to competing sources of supply."[94] In Order No. 2000, the Commission reiterated the holding of Order No. 888 where the Commission declared:

> The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by

[92] *See*, *supra* footnote 34.

[93] Order No. 1920 at P 1706 (emphasis added).

[94] Order No. 1000 at P 254, *citing* Order No. 888, FERC Stats. & Regs. at 31,682; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 524.

> refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices.[95]

Whereas prior major FERC transmission orders sought to rein in the acknowledged self-interested behavior of incumbent transmission owners, in Order No. 1920 the Commission seems to believe itself impotent to hold incumbent transmission owners accountable. Where prior Commissions took action to address self-interested behavior, Order No. 1920 asserts that "the transmission provider *holds the leverage* as to whether *to build* a right-sized replacement transmission facility or *a less efficient in-kind replacement transmission facility . . .*."[96] What? The transmission provider "holds the leverage" over the Commission?[97]

Although the Commission is charged by Congress with addressing unjust, unreasonable, unduly discriminatory and preferential rates and practices effecting rates, and current Commission rules and the Final Rule *require* the determination of the more efficient or cost effective regional project (and the displacement of the locally planned project), Order No. 1920 believes the Commission is somehow prohibited from disallowing individual transmission owners from recovery of FERC-jurisdictional transmission rates for moving forward with "a less efficient in-kind replacement transmission facility."[98] Order No. 1920's answer: to *mandate* exactly what FPA

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[95] Order No. 2000 at page 35, *citing* Order No. 888, FERC Stats. & Regs. at 31,682.

[96] Order No. 1920 at P 1706.

[97] The Commission's suggestion that a transmission provider "holds the leverage" is consistent with the characterization of LS Power regarding the NOPR proposal, where LS Power characterized the Commission's approach as "we find that we have no control over incumbent transmission owners' local planning so we must capitulate to their ransom demands and grant them the right to develop regional projects without competition." LS Power Initial Comments at 54. As Justice Thomas pointed out in dissent in *New York v. FERC*, the Commission's failure to exercise jurisdiction given to it by Congress requires the same scrutiny as its exercise of jurisdiction: "FERC failed to explain why regulating such transmission is not "necessary," and FERC's inconclusive jurisdictional analysis does not provide a sound basis for our deference." *New York v. FERC*, 535 U.S. at 30, Thomas, Justice concurring in part, dissenting in part.

[98] This rehearing is not addressing the failure of the Commission to address, as it must, what it identified as an unjust and unreasonable rate, the ability of an existing transmission owner to move forward with a "less efficient in-kind

Section 206 prohibits, an unduly discriminatory preference for existing transmission owners to build new regionally needed, and regionally cost allocated transmission. Order No. 1920's mandate of the Monopoly Preference has no support in the FPA.

As noted above, the so-called right-sizing "federal right of first refusal" section of the Order No. 1920, PP 1693-1709, does not reference a single provision of the FPA as supporting Order No. 1920's granting of a federal franchise for future "right-sized replacement transmission facilities"[99] based on the mere existence of an existing transmission facility of a different character. This is not surprising as no such provision exists. In the absence of statutory authority to grant a federal monopoly, the Commission has no such authority. "As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'"[100] Congress provided the Commission no authority to provide a federal franchise for transmission in interstate commerce. "[A]n agency literally has no power to act ... unless and until Congress confers power upon it."[101] The Commission asserted authority to mandate federal transmission franchises represents an "extraordinary case[ ] . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[102] In the 90+ year history of the FPA the Commission has never asserted that Congress granted it the power to provide a federally declared exclusive

replacement transmission facility" notwithstanding that a more efficient and cost-effective regional project has been identified in a Commission required process.

[99] Order No 1920 at P 1679.

[100] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) *citing Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001) (emphasis added).

[101] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

[102] *W. Va. V. EPA*, 597 U.S. 697, 721 (2022).

franchise[103] based on state granted retail franchises or the fact that the awardee had, at some point in history, developed transmission in interstate commerce within FERC jurisdiction. In *Orangeburg, South Carolina v. FERC*[104] the Court rejected the Commission's reliance on state-sanctioned action as a basis for disparate treatment, finding "insofar as the Commission attempts to justify disparate treatment of interstate wholesale customers by invoking a state commission's authority, FERC's interpretation of Order No. 2000 is unsound."[105] The Court relied on the fact that the FPA requires FERC to address disparate treatment and found that "[u]nless FERC offers such a valid reason, its decision to approve disparate treatment of wholesale ratepayers is 'arbitrary and capricious.'"[106] While the Court in *Orangeburg* was addressing disparate treatment among ratepayers, in addressing requests for rehearing of Order No. 1000, the Commission confirmed that the obligation to address disparate treatment is not limited to ratepayers.[107] The Commission specifically rejected those narrow readings of the limitation of Section 206, finding that "[w]e continue to believe, as the Commission found in Order No. 1000, that we have a duty to consider anticompetitive practices and to eliminate barriers to competition consistent with the FPA"[108] and "we continue to conclude that the Commission's action is in accordance with its responsibility to eliminate unduly discriminatory or preferential practices in regional transmission planning processes."[109] Importantly, as a group that includes significant ratepayers, the Competition

[103] Order No. 1920's use of the made-up phrase "federal right of first refusal" cannot hide the fact that what Order No. 1920 provides in the mandatory federal right of first refusal is a perpetual franchise for certain future transmission projects.

[104] 862 F.3d 1071 (2017).

[105] *Id*. at 1087.

[106] *Id*. at 1084.

[107] Order No. 1000-A at PP 351-352.

[108] *Id.* at P 361.

[109] *Id*. at P 362.

Coalition has consistently demonstrated that disparate treatment of nonincumbent transmission developers has a direct negative impact on transmission rates, making those rates unjust and unreasonable.

Further, Order No. 1920 makes no effort to tie its requirement for a federal transmission franchise for regional projects supplanting the need for a local in-kind replacement to a grant of authority under the FPA. Because Order No. 1920 is silent as to the statutory authority for a federal transmission franchise, Order No. 1920 certainly cannot be said to provide "something more than a merely plausible textual basis for the agency action" as required by *West Virgina v. EPA*.[110]

Further, even the FPA Section generically referenced as providing the Commission the authority to issue Order No. 1920 – Section 206 – cannot possibly support the Commission's mandate of an incumbent exclusive preference for future regionally needed transmission as Section 206 mandates the exactly opposite result, elimination of preferential rates or practices affecting rates. Order No. 1920 offers no explanation as to how Section 206's prohibition on unduly discriminatory or preferential rates or practices affecting rates is not directly violated by a *mandated* Commission-created discriminatory preference that removes existing opportunities for nonincumbent developers by ensuring that existing transmission owners "will have *certainty* that they will not lose the opportunity to invest in any in-kind replacement transmission facility that is then selected as a right-sized replacement transmission facility."[111] No explanation is offered – and none can be provided – because the Commission determined in Order No. 1000, and affirmed in Order No. 1000-A that under Section 206 "elimination of any federal rights of first refusal from Commission-jurisdictional tariffs and agreements *is necessary to address opportunities for undue*

[110] *W. Va. V. EPA*, 597 U.S. at 723.

[111] Order No. 1920 at P 1707 (emphasis added).

*discrimination and preferential treatment against nonincumbent transmission developers* within regional transmission planning processes."[112] The United States Court of Appeals for the D.C. Circuit upheld that determination.[113]

To be clear, as discussed further in Error No. 3, FERC cannot simply casually ignore its prior declaration that rights of first refusal for regional projects are unduly discriminatory and preferential. This fact is not changed because those prior self-serving preference provisions were originally filed under Section 205, not rates set by the Commission under Section 206. The fact that such preferences once existed confers no authority on FERC to mandate them now. This is because "Section 205 'is intended for the benefit of the utility,' and 'FERC plays 'an essentially passive and reactive' role under section 205.'"[114] When the Commission eliminated those Section 205 filed preferences it was required to affirmatively establish that the preferences were unlawful under the Federal Power Act. "[R]equiring FERC to show that an existing rate is unlawful before ordering a new rate under section 206, provides a form of 'statutory protection' to a utility."[115] Because "section 206 mandates a two-step procedure that requires FERC to make an explicit finding that the existing rate is unlawful before setting a new rate"[116] to the extent that Order No. 1920 seeks to rely on some claimed authority under Section 206 to now mandate an incumbent

[112] Order No. 1000-A at P 361 (emphasis added). As discussed in Error No. 3, the Commission made no effort to address Order No. 1920's deviation from prior precedent.

[113] *See generally South Carolina Public Service Authority v. FERC*, 762 F.3d 41, 71-76.

[114] *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017), *citing City of Winnfield*, 744 F.2d at 875 and *Atl. City Elec.*, 295 F.3d at 10 *quoting City of Winnfield*, 744 F.2d at 876.

[115] *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017), *citing City of Winnfield*, 744 F.2d at 875.

[116] *Id*.

preference it cannot simply ignore the fact that it previously found the very preference unlawful under Section 206.[117]

In this regard, Order No. 1920 is also disingenuous in asserting that "[w]e find that the Commission's reasons for removing federal rights of first refusal in Order No. 1000 do not apply to right-sized replacement transmission facilities."[118] In making that assertion, Order No. 1920 focuses on the "the consideration of more efficient or cost-effective potential transmission solutions proposed at the regional level."[119] That limited focus on one aspect of Order No. 1000 is misplaced as it ignores the competitive components of Order No. 1000 regarding just and reasonable rates. In Order No. 1000-A the Commission explained "*We continue to believe*, as the Commission found in Order No. 1000, that *we have a duty to consider anticompetitive practices and to eliminate barriers to competition consistent with the FPA*."[120] The mandated ROFR or Monopoly Preference for new right-sized replacement facilities that would more efficiently or cost effectively replace a locally planned project takes away an opportunity that competitive transmission developers have today, as all such regional projects are subject to required competition. Order No. 1920's presumed answer – that the transmission owner's self-interest would likely lead it to develop a less efficient local project thus presumably depriving the nonincumbent developer of the regional opportunity – does not answer the question of whether the FPA allows the Commission itself to deprive nonincumbent developers of the opportunities currently required were such regional projects to be regionally cost allocated. The fact remains:

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[117] *MISO TOs v FERC*, 45 F.4th 248, 264 (D.C. Cir. 2022) *citing FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("FERC is, of course, entitled to change its mind. But to do so, it must provide a 'reasoned explanation' for its decision to disregard 'facts and circumstances that' justified its prior choice.")

[118] Order No. 1920 at P 1706.

[119] *Id*.

[120] *Id*. at P 361 (emphasis added) (footnotes omitted).

these so-called "right-sized" projects address Long-Term Transmission Needs at the regional level (which includes locally identified in-kind replacement needs) will largely be regionally cost allocated and therefore would be competitive under current requirements. As such, the Commission action takes away opportunities that Order No. 1000 mandated were to be available for nonincumbent developers.[121]

As discussed more fully in Error No. 3, Order No. 1920 cannot circumvent establishing its authority to grant the Monopoly Preference by merely asserting that it is not creating a new preference, it is creating "an exception to Order No. 1000's general requirement to for transmission providers to eliminate any right of first refusal for regional transmission facilities selected in a regional transmission plan."[122] For several reasons, that assertion does relieve the Commission of its obligation to establish its authority to grant a preference. As an initial matter, it is inconsistent with Order No. 1920 at P 1702 where Order No. 1920 is clear that it is not identifying an exception but instead "requir[ing] *the establishment* of a federal right of first refusal for a right-sized replacement transmission facility."[123] The need to *establish* a preference rather than allow an exception to the required removal is not surprising as the provisions were removed a decade ago consistent with the requirement of Order No. 1000. Additionally, again as discussed below in Error 3, the Commission unequivocally rejected the very "exception" Order No. 1920 now claims to allow. Although the Commission already previously required the removal of preferences for the regional projects at issue pursuant to FPA Section 206 and rejected requests for an exception

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[121] *See, e.g.*, Order No. 1000 at P 332 ("The Commission also requires that a nonincumbent transmission developer must have the same eligibility as an incumbent transmission developer to use a regional cost allocation method or methods for any sponsored transmission facility selected in the regional transmission plan for purposes of cost allocation.")

[122] Order No. 1920 at P 1704.

[123] Order No. 1920 at P 1702 (emphasis added); *see also id.* at P 1703 ("In adopting the NOPR proposal to require the establishment of a federal right of first refusal for aright-sized replacement transmission facility . . .."

to the required removal for entirely new transmission facilities replacing existing facilities, Order No. 1920 now claims an "exception" to Order No. 1000 but fails to establish Commission authority to "require the establishment" of the Monopoly Preference.

The Commission's assertion that Order No. 1920 does not deviate from Order No. 1000 also masks the fact that Order No. 1000 was focused on process, identifying the right regional project. The issue leading Order No. 1920 to grant an extra statutory preference is not the "identification" of the more efficient or cost-effective regional project – as the rules already require that – but an effort by the Commission to ensure that those regional projects actually get built. The Commission declared that the reason for the federal preference was "helping to ensure that the more efficient or cost-effective regional transmission solution to Long-Term Transmission Needs is selected *and likely built* . . .."[124] The Commission has no authority to under the FPA to direct that transmission get built.[125]

The foregoing demonstrates that the Commission's mandated "federal right of first refusal" or Monopoly Preference exceeds the Commission's authority under the Federal Power Act.

### C. ERROR #3: The New Incumbent Owner Monopoly Preference For Right-Sized Replacement Projects, Which Are Eligible For Regional Cost Allocation, Departs From Commission Precedent Without Justification.

While the Commission may change its policies and rules, it must "show good reasons for the new policy" and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by [its] prior policy."[126] Order No. 1920 fails to show good

[124] Order No. 1920 at P 1703.

[125] 16 U.S.C. 824o.

[126] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*F.C.C. v. Fox*).

reason for the new policy, and largely ignores the fact that it is a wholesale departure from Order No. 1000. In this regard, Order No. 1920 asserts:

> We note that the establishment of a federal right of first refusal for right-sized replacement transmission facilities is an exception to Order No. 1000's general requirement for transmission providers to eliminate any federal right of first refusal for regional transmission facilities selected in a regional transmission plan. In response to comments challenging this approach as violating the precedent set in Order No. 1000, which eliminated federal rights of first refusal for new selected transmission facilities, we find that requiring a federal right of first refusal for right-sized replacement transmission aligns with Order No. 1000.[127]

Order No. 1920's assertion is incorrect. Order No. 1000 and subsequent orders rejected an exception from the competition requirements for projects that replace in its entirety an existing transmission facility.[128] Order No. 1000 drew a clear line between regionally cost allocated transmission projects and locally cost allocated transmission projects in terms of which projects required the removal of then existing incumbent preferences and which must be subject to the required competition.[129] It also included a very narrow exception for upgrades to existing transmission facilities, including new transmission facilities that replace part of an existing transmission facility, but not an entirely new transmission facility.[130] Under Order No. 1000, only new transmission projects (not including upgrades) that are subject to a competitive transmission process are eligible to be regionally cost-allocated. Order No. 1000 further noted that under its

[127] Order No. 1920 at P 1704.

[128] *See* Order No. 1000-A at P 368.

[129] *Id*. at P 426.

[130] Order No. 1000-A at P 426.

reforms, incumbent and nonincumbent transmission developers would have equal access to regional cost allocation.[131]

Order No. 1920's mandate for an incumbent preference for regionally planned and cost allocated projects simply because they include a "right-sizing" component eviscerates the requirements of Order No. 1000 regarding which regional projects can be subject to a retained preference and cannot, in any respect, be said to align with Order No. 1000.[132] Order No. 1920 fails to adequately justify this one-hundred-and-eighty-degree turn from Order No. 1000 or explain why the reasons underlying Order No. 1000's developer reforms do not apply to these new regional projects. Simply asserting more than a decade after issuing Order No. 1000 that the complete reversal is merely an "exception to Order No. 1000's general requirement for transmission providers to eliminate any federal right of first refusal for regional transmission facilities selected in a regional transmission plan"[133] or that the change "aligns" with Order No. 1000 does not provide the reasoned explanation required of the Commission when deviating from a prior policy. Order No. 1920's assertion that the Final Rule merely provides an exception to a general requirement is not a valid characterization of Order No. 1000, 1000-A, and numerous Order No. 1000 compliance orders which rejected a preference based on the same factors that Order No. 1920 now seeks to mandate such a preference. While the Commission may change its policies and rules, it must "show good reasons for the new policy" and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by [its] prior policy."[134]

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[131] Order No. 1000 at P 332 ("The Commission also requires that a nonincumbent transmission developer must have the same eligibility as an incumbent transmission developer to use a regional cost allocation method or methods for any sponsored transmission facility selected in the regional transmission plan for purposes of cost allocation.").

[132] Order No. 1920 at P 1702.

[133] Order No. 1920 at P 1704.

[134] *F.C.C. v. Fox*, 556 U.S. at 515.

Lacking a sufficient justification, the decision to mandate a ROFR or Monopoly Preference for right-sized replacement projects is arbitrary and capricious and must be reversed on rehearing.

### 1. A New Monopoly Preference For Right-Sized Replacement Transmission Facilities Cannot Be Squared With Order No. 1000.

Order No. 1920's decision to mandate a Commission-created transmission owner ROFR or Monopoly Preference for a new subset of regional transmission projects—dubbed right-sized replacement transmission facilities[135]—essentially rests on the conclusion that, without the Monopoly Preference to build the regional projects that will displace the transmission owner's locally planned in-kind replacement, transmission owners will block more efficient or cost-effective regional solutions to regional needs.[136] Order No. 1000 addressed this concern head on.

Order No. 1920's assertion as to why it is mandating a federal monopoly for future regional projects starts from the unsupported premise that incumbent transmission owners "may have existing rights and responsibilities with respect to maintaining, and when necessary, replacing their transmission facilities."[137] Based on those uncited claims of rights and responsibilities under existing laws, Order No. 1920 presumes that a transmission owner will move forward with the less efficient or cost effective in-kind replacement project to avoid the potential that the more efficient project to address its needs and regional needs will be subject to competition and that it will not win the right to proceed with that more efficient project.[138] As Order No. 1920 puts it, incumbent

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[135] While Order No. 1920 refers to the applicable transmission facilities as "right-sized replacement facilities" the moniker gives too much status to the fact that the replacement of aging transmission is just one of the multitude of regional needs addressed by the selected Long-Term Transmission Needs project.

[136] Order No. 1920 at P 1706.

[137] *Id.* The Commission also referenced "existing laws related to an individual transmission provider's ability to proceed with an in-kind replacement transmission facility . . .." *Id.* Order No. 1920 identified no such "existing rights" or "existing laws" nor provided any other explanation as to why the Commission was unable to rein in those rights or laws under its Congressional granted exclusive jurisdiction over transmission in interstate commerce to the extent they lead to unjust and unreasonable transmission rates.

[138] *Id.*

transmission owners "would prefer the assurance of a federal right of first refusal . . . over the uncertainty of subjecting a [right-sized project] to the Order No. 1000 competitive transmission development process."[139] Order No. 1920 concludes that the incumbent transmission owner's decision to move forward with the "less efficient in-kind replacement transmission facility"[140] will block regional transmission planning and the development of a more efficient or cost-effective regional project, leading to unjust and unreasonable rates.[141]

Order No. 1920 ignores that the Commission considered in the Order No. 1000-rulemaking proceeding the possibility that an incumbent transmission owner may move forward with its own locally planned transmission project instead of relying on the regional transmission project and found that this possibility did not justify retaining monopoly preferences.[142] Like Order No. 1920, the Commission acknowledged in Order No. 1000 that an incumbent transmission owner may have "reliability needs or service obligations"[143] that it must meet and thus allowed an incumbent transmission owner to "meet its reliability needs or service obligations by choosing to build new transmission facilities that are located solely within its retail distribution service territory or footprint . . .."[144] The difference, however, is that, under Order No. 1000, the incumbent transmission owner gives up the opportunity for regional cost allocation because local transmission projects are not eligible for regional cost allocation.[145] In a complete reversal of Order No. 1000

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[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *See, e.g., CBS Corp. v. F.C.C.*, 785 F.3d 699, 709 (D.C. Cir. 2015) (finding an agency decision arbitrary and capricious because the agency failed to explain how its prior rule conflicted with the new policy).

[143] *See, e.g.*, Order No. 1000-A at P 368.

[144] Order No. 1000-A at P 379.

[145] *Id*. at P 368.

in this regard, Order No. 1920 provides that by planning a local in-kind replacement, the transmission owner planning locally would be mandated a preference to construct a regional project addressing Long-Term Transmission Needs, with costs allocated pursuant to the regional cost allocation method for such projects, if the regional project would supplant the need for the in-kind replacement.

Furthermore, under Order No. 1000, an incumbent transmission owner could put forward its locally planned transmission project forward as a regional project for purposes of cost allocation, but it was also obligated to participate in the regional planning process to determine whether a regional project would be more efficient or cost-effective than the transmission owner's locally planned project.[146] The transmission providers in the region have an affirmative obligation to engage in regional planning.[147] The purpose of the regional planning process under Order No. 1000 was to identify more efficient or cost-effective solutions, and to displace the less efficient locally planned projects.[148] If the incumbent transmission owner decided to move forward with a local transmission project even though a regional transmission project is more efficient or cost-

[146] *See, e.g.*, Order No. 1000 at P 6 ("public utility transmission providers [must] participate in a regional transmission planning process that evaluates transmission alternatives at the regional level that may resolve the transmission planning region's needs more efficiently and cost-effectively than alternatives identified by individual public utility transmission providers in their local transmission planning processes."); *see also id.* at P 68 ("These reforms work together to ensure that public utility transmission providers in every transmission planning region, in consultation with stakeholders, evaluate proposed alternative solutions at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers.").

[147] *Id.* at PP 6, 68, 148; *see also id.* at P 80 "(In other transmission planning regions, however, as permitted by Order No. 890, public utility transmission providers use the regional transmission planning process as a forum to confirm the simultaneous feasibility of transmission facilities contained in their local transmission plans. We conclude that it is necessary to have an affirmative obligation in these transmission planning regions to evaluate alternatives that may meet the needs of the region more efficiently or cost-effectively.").

[148] *Id.* at PP 6, 68, 80, 148. One of the deficiencies in Order No. 890 that Order No. 1000 sought to remedy was that "public utility transmission providers are currently under no affirmative obligation to develop a regional transmission plan that reflects the evaluation of whether alternative regional solutions may be more efficient or cost-effective than solutions identified in local transmission planning processes." *Id.* at P 3.

effective, then there is a record that stakeholders could use to challenge the prudency of the local project at the state and federal levels.

In Order No. 1000, the Commission found that the reasons for eliminating monopoly preferences was necessary even if the incumbent transmission owner chooses to move forward with a locally planned transmission project.[149] Without sufficient explanation, Order No. 1920 reaches the opposite conclusion – that because an incumbent transmission may choose to move forward with an in-kind replacement facility of its aging transmission – it must have a ROFR or the Monopoly Preference to develop, construct, and own the more efficient or cost-effective regional right-sized replacement transmission facility to ensure that the regional project moves forward.[150] Order No. 1920 fails to provide reasoned explanation as to why it was appropriate to reverse course on the determinations made in Order No. 1000.

Equally troubling, in Order No. 1000-A the Commission addressed requests for clarification on what projects were subject to continuation of the retained limited preference for regional projects that contained components that would be an "upgrade" to existing facilities.[151] The Commission stated:

> In response to requests for clarification regarding what the Commission considers to be an upgrade, we note that in Order No. 1000, the term upgrade means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The term upgrades does not refer to an entirely new transmission facility.[152]

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[149] Order No. 1000-A at P 179 (acknowledging that a transmission owner may choose a local transmission project over a regional project, but that having the regional transmission process consider alternatives, including those proposed through competitive processes, would result in the identification of the more efficient or cost-effective solution).

[150] Order No. 1920 at P 1706.

[151] Order No. 1000-A at P 426.

[152] Order No. 1000-A at P 426.

As noted above, the Commission then specifically rejected the concept that there should be federal monopoly for "an entirely new transmission facility."

Notwithstanding that judicial precedent makes it clear that the Commission must provide reasoned explanation for its departure from existing policy,[153] Order No. 1920 offers no such reasoning. Indeed, Order No. 1920 appears to attempt to side-step the requirement by asserting "[w]e find that the Commission's reasons for removing federal rights of first refusal in Order No. 1000 do not apply to right-sized replacement transmission facilities."[154] As recounted above, and in numerous other places in Order No. 1000, 1000-A, Order No. 1000 compliance orders, the Commission at the time reached a completely different analysis regarding the appropriate removal of incumbent monopoly preferences. Order No. 1920 arbitrarily and capriciously ignore those Order No. 1000 conclusions by simply reimagining what prior precedent intended when that prior precedent was clear. Further, as addressed in Error No. 2, in finding under Section 206 that preferences were unjust unreasonable, unduly discriminatory or preferential, the Commission found them unlawful under the Federal Power Act. Mandating a federal preference now is inconsistent with that fundamental premise of Order No. 1000. Order No. 1920 ignores and does not engage that precedent. Thus, contrary to its assertion, Order 1920 does not "align[] with Order No. 1000."[155] Order No. 1920 has not justified establishing the Monopoly Preference for right-sized replacement projects.

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[153] *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) (holding that FERC's "180 degree turn away" from existing precedent without "persuasively distinguish[ing]" its new position is "quintessentially arbitrary and capricious"; *F.C.C. v. Fox*, 556 U.S. 502, 515.

[154] Order No. 1920 at P 1706.

[155] Order No. 1920 at P 1704.

### 2. Order No. 1920 Does Not Consider How A New Monopoly Preference Will Discourage The Participation Of Nonincumbent Developers.

Order No. 1000 was based on the finding that the Commission could not effectively determine just and reasonable transmission rates with incumbent preferences in place because those preferences stymied the participation of nonincumbent developers in the planning process. Order No. 1920 does not adequately address this deviation from Order No. 1000, instead glossing over the impact that a new ROFR for right-sized replacement projects will have on nonincumbent participation in the regional planning process. Order No. 1920 concludes that mandating a new ROFR for right-sized replacement projects is appropriate because "it will *promote* the consideration of more efficient or cost-effective potential regional transmission solutions to address Long-Term Transmission Needs."[156] The Commission only identifies the claimed potential benefit of a new Monopoly Preference for right-sized projects, namely that incumbent transmission owners will support the identification of new regional projects if they are guaranteed the right to build them instead of "likely proceed[ing] to develop the less efficient or cost-effective in-kind replacement transmission facility."[157] Order No. 1920 does not address what Order No. 1000 focused on, and what is lost with the introduction of a new incumbent preference – the participation of nonincumbent transmission developers and the degradation of consumer support for regional projects – and is therefore arbitrary and capricious.

Order No. 1920 acknowledges, as Order No. 1000 did, that ROFRs and monopoly preferences create barriers to entry that discourage nonincumbent developers from proposing alternative solutions,[158] but deems the loss of alternative solutions acceptable "because the right-

[156] Order No. 1920 at P 1706.

[157] *Id*.

[158] *Id*. at P 1705.

sized replacement transmission project represents the more efficient or cost-effective regional transmission solution to address Long-Term Transmission Needs (otherwise it would not be selected)."[159] The problem with this conclusion is that it puts the cart before the horse by assuming (without any supporting evidence or data) that the identified right-sized solution will always represent the more efficient or cost-effective solution for Long-Term Transmission Needs. Yet, without participation of nonincumbent developers, it will be impossible to confirm that the selected regional right-sized replacement transmission facility is the more efficient or cost-effective solution, because the region will make the determination without comparing the solution to alternatives, which would include potentially innovative projects proposed by nonincumbent developers.

Furthermore, mandating the inclusion of a new incumbent preference in tariffs is another disincentive to nonincumbent developers participating in the regional planning process, whether the process is a competitive bidding model, sponsorship model, or the various models used in non-RTO regions. Participating in the regional planning process requires an investment of time and resources and, as Order No. 1000 found, nonincumbent developers are less likely to participate in the regional planning process if they are likely to be excluded from proposing and developing projects.[160] The Commission cannot simply ignore that Order No. 1920 takes an opposite approach

[159] Order No. 1920 at P 1706.

[160] *See* Order No. 1000 at P 257 (noting comments that nonincumbents developers are disincentivized from committing resources to a potential projects that it may not develop because the incumbent transmission owner exercises a right of first refusal); Order No. 1000-A at P 428 (rejecting calls to exclude reliability projects and finding "Allowing incumbent transmission providers to maintain a federal right of first refusal, even with a limited 90-day election period as proposed by Xcel, *would discourage transmission developers from proposing transmission projects that may be a more efficient or cost-effective solution to meet regional transmission needs,* resulting in rates for jurisdictional transmission services that are unjust and unreasonable or unduly discriminatory or preferential." (emphasis added)); *South Carolina Public Service Authority v. FERC*, 762 F.3d 41, 72 (2014) (recounting the Commission's findings that "In practice, incumbents were likely to exercise their rights of first refusal once the benefits of a new project were demonstrated. In this way, rights of first refusal discouraged non-incumbents from proposing transmission facilities.

to Order No. 1000 (or claim that it does not) on the correlation between incumbent preferences and nonparticipation of nonincumbent transmission developers in the regional transmission planning process but instead must specifically address the changed approach.[161]

Order No. 1000 set out three major requirements that worked together to ensure that more efficient or cost-effective transmission solutions were identified and likely to be built: (1) regional planning, (2) opening transmission development to nonincumbent transmission developers, and (3) *ex ante* cost allocation methods applicable to transmission projects that were regionally planned and subjected to competition.[162] Regional cost allocation was and is a contentious issue.[163] Order No. 1000 rightly recognized that a regionally cost-allocated transmission project was more likely to garner support and ultimately get built if the transmission project was the product of a regional planning process that solicited the best transmission solutions in terms of engineering, design, and cost.[164] Hence one of the major rules underlying Order No. 1000's reforms was that, subject to narrow exceptions discussed in the next section, new transmission facilities that had been

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Not only would nonincumbents be unlikely to recoup the full benefits of their proposal, but they would not even be able to recoup the costs of identifying the need and making a proposal that would address it."; *South Carolina*, 762 F.3d at 77 (rejected finding "Although petitioners are no doubt correct that the previous regime improved transmission planning, non-incumbent developers were not likely to participate in that regime because rights of first refusal left them with little to gain. *See* Order No. 1000 ¶ 229, 76 Fed. Reg. at 49, 881. By removing a pre-existing barrier to entry, the orders make it more likely that those key parties will actually join that process, making the transmission development process more competitive, which, in the Commission's reasoned expert judgment, will help to ensure that rates are just and reasonable.").

[161] *See Belmont Municipal Light Dept. v. FERC*, 38 F.4th 173, 187 (D.C. Cir. 2022) (holding FERC's "analysis in this case contradicts" past decisions without acknowledging or explaining the contradiction); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 234 (D.C. Cir. 2018) (holding that FERC's order was arbitrary and capricious because FERC failed to adequately explain why its prior reasoning did not apply).

[162] *See* Order No. 1000 at P 68.

[163] *See, e.g.*, Order No. 1000 at P 485.

[164] Order No. 1000 at PP 11, 42 (discussing how the Order No. 1000 reforms "are designed to work together" to make it more likely transmission facilities will be move forward to construction)..

regionally planned and undergone a competitive process were eligible to be regionally cost-allocated.[165]

If the Commission's goal is to make it more likely that more efficient or cost-effective regional transmission projects are built,[166] then eliminating opportunities for nonincumbent transmission developer participation in the planning process mandating an incumbent preference goes in the wrong direction. Order No. 1000 correctly found that the regional planning process is more likely to identify more efficient or cost-effective solutions when nonincumbent developers participate and have the ability to propose alternative solutions.[167] Order No. 1920 fails to fully address how the lack of nonincumbent developer participation will negatively impact the regional planning process and why that is okay under Order No. 1920 when it led the Commission to act under Section 206 in Order No. 1000.

### 3. Order No. 1920 Alters The Order No. 1000 Distinction Between Replacement Transmission Facilities And Entirely New Transmission Facilities Without Explanation.

The so-called right-sizing ROFR section of the Final Rule approaches the question of whether a regional transmission project that is replacing an existing transmission facility is a an upgrade or entirely new transmission facility and whether an incumbent transmission owner should have a preference to build the transmission project as if the Commission is working with a clean slate.[168] However, the Commission addressed this question in Order No. 1000-A – finding that an

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[165] *See, e.g.*, Order No. 1000-A at P 368.

[166] *See, e.g.*, Order No. 1920 at P 1707.

[167] *See* Order No. 1000 at P 284 (granting incumbent transmission providers a federal right of first refusal with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process. This is unjust and unreasonable because it may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, the inclusion of higher-cost solutions in the regional transmission plan.").

[168] *See* Order No. 1920 at P 1704.

upgrade involves the replacement of only *part of* an existing transmission facility[169] – and has further refined the answer over the last decade.[170] Order No. 1920 mandates that a transmission owner will have a preference for a regional project that would replace an entire existing transmission line.[171] The Final Rule does not acknowledge any of this existing precedent on what constitutes a regional upgrade to existing facilities and what is an entirely new facility. The Commission cannot shirk its responsibility to address this prior precedent simply by referring to the rejoin project by a new name, a "right-sized replacement transmission facility."[172]

A fundamental principle of administrative law is that an agency cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[173] An agency can change course but "must provide a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"[174] Because Order No. 1920 fails to acknowledge and justify its departure from existing Commission precedent that limits retention of a preference only for a regional project that represents a replacement of *part of* an existing transmission facility and not the replacement of an entire transmission facility, the right-sizing ROFR section of Order No. 1920 is arbitrary and capricious.

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[169] Order No. 1000-A at P 426.

[170] *See, e.g.*, *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 at P 181 (2013), *order on reh'g and compliance*, 149 FERC ¶ 61,048 (2014), *order on reh'g and compliance filing*, 151 FERC ¶ 61,045 (2015), *order on compliance filing*, 152 FERC ¶ 61,106 (2015); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 (2013), *order on reh'g and compliance filings*, 147 FERC ¶ 61,127 (2014), *order on reh'g and compliance filings*, 150 FERC ¶ 61,037 (2015); *New York Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038 (2021).

[171] *See* Order No. 1920 at PP 1677-1680.

[172] Order. No. 1920 at P 1702, fn 3613.

[173] *F.C.C. v. Fox*, 556 U.S. 502, 515.

[174] *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003), *quoting Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

While Order No. 1920 purports to create an "exception" to Order No. 1000,[175] Order No. 1000 addressed the exceptions it permitted and did not create an exception for an entirely new transmission facility at the regional level. One of the exceptions to Order No. 1000's competition requirement for regionally cost allocated projects is that a transmission owner may retain a preference for a narrowly defined set of transmission projects, "upgrades."[176] The Commission clarified in Order No. 1000-A that upgrades are an "improvement to, addition to, or replacement of a part of, an existing transmission facility."[177] The Commission did not attempt to describe every type of upgrade, but explained that an upgrade is "not . . . an entirely new transmission facilities," because "there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others."[178]

The Commission affirmed its distinction between a replacement and an entirely new transmission facility during the Order No. 1000 compliance process. Southwest Power Pool, Inc. ("SPP") proposed to exclude from the competitive process "rebuilds" of existing transmission facilities.[179] Citing Order No. 1000-A, the Commission required SPP to revise the exemption to clarify that it would not be used to exempt from competition "entirely new transmission facilities."[180] In a subsequent compliance filing, SPP proposed to define an upgrade, in part, as a "replacement of all or part of, an existing transmission facility."[181] The Commission again rejected

[175] Order No. 1920 at P 1704.

[176] Order No. 1000 at PP 226, 319.

[177] Order No. 1000-A at P 426 (emphasis added).

[178] *Id*.

[179] *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 at P 181.

[180] *Id*. at P 184.

[181] *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,048 at P 149.

SPP's exemption because it would exempt "an entire transmission facility rather than the replacement *of a part* of an existing transmission facility."[182]

As opposed to SPP's more general definition of upgrades, the Midcontinent Independent System Operator, Inc. ("MISO") proposed as part of its Order No. 1000 compliance a multi-prong definition of upgrades that addressed each part of the upgrade definition and gave examples. The MISO compliance orders demonstrated that the line between a replacement transmission facility and a new transmission facility is not always straightforward and can be fact-specific. For instance, MISO proposed to exempt from competition projects that involve replacing single-circuit structures with multi-circuit structures on an existing transmission line.[183] The Commission found that there could be "circumstances . . . where replacing single circuit structures with multi-circuit structures on an existing transmission line may inappropriately qualify this new transmission facility as an upgrade" and required MISO to modify the language in a further compliance order.[184]

In 2020, the New York Independent System Operator, Inc. ("NYISO") petitioned the Commission to rule on whether certain scenarios involving replacing existing transmission facilities resulted in a replacement transmission facility or an entirely new transmission facility.[185]

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[182] *Id*. at P 158; *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 at P 238 (rejecting a part of MISO's definition of an upgrade because it would allow "the functionally equivalent capital replacement of an entire existing transmission line facility with an entirely new transmission line," which is inconsistent with Order No. 1000-A); *New York Indep. System Operator, Inc.*, 143 FERC ¶ 61,059 (2013), *order on reh'g and compliance*, 148 FERC ¶ 61,044 (2014) (The Commission rejected an argument that the replacement of an existing transmission facility cannot be considered an entirely new facility because the facilities are integrated parts of the transmission system. The Commission reiterated that a replacement cannot be the replacement of an entire transmission facility because, if it was, the exception "would swallow the rule.").

[183] *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 at PP 227-28.

[184] *Id*. at P 228.

[185] *New York Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038 (2021). The issue arose when certain New York incumbent transmission owners asserted, for the first time, that they retained a preference for upgrades to existing facilities notwithstanding that their Order No. 1000 compliance filing asserted that no incumbent preference existed in the New York Independent System Operator region. *New York Indep. Sys. Operator, Inc.*, Compliance Filing, Docket No. ER13-102-000 (October 11, 2012) ("Order No. 1000 Compliance Filing") at 31 (asserting ""[t]he NYISO's Tariffs do not contain any ROFR [right of first refusal] provisions.")

NYISO sought guidance because it anticipated that future regional transmission solutions were likely to require modifications to a transmission owner's existing transmission facilities.[186] NYISO asked FERC how to classify a transmission project that would require the retirement or decommissioning of a New York transmission owner's existing transmission facility where the transmission project connects to the transmission system in a new configuration.[187] Specifically, NYISO put forth a "scenario in which a developer proposes to remove an existing 115 kV transmission line to allow for a new 345 kV transmission line to take its place in the existing right-of-way."[188] NYISO itself assumed that an upgrade preference would not be available, stating:

> In this scenario, the new 345 kV transmission line would connect to the transmission system in a different configuration (i.e., connect to different buses and/or substations), which results in a different power flow, and the former line would no longer exist. NYISO states that, under this scenario, it seems that the new 345 kV line should be classified as a new transmission facility, rather than as an upgrade, because it performs different transmission functions on the bulk power system than those performed by the original 115 kV line.[189]

The Commission agreed, finding that such a regional project was not entitled to an exclusion from Order No. 1000:

> We grant NYISO's request and find that the scenario in which a new transmission facility, that would require the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility, would constitute a new transmission facility, rather than an upgrade. In Order No. 1000-A, the Commission stated that "the term upgrades does not refer to an entirely new transmission facility."[] The Commission has also "specifically limited what new transmission facilities replacing existing transmission facilities may qualify as upgrades, and, in doing so, required that an upgrade cannot include the replacement of an

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[186] *NYISO*, 175 FERC ¶ 61,038 at P 12, n.34.

[187] *Id*. at PP 15-16.

[188] *Id*. at P 16. It is significant to note that NYISO's filing assumed that *any* transmission developer could propose to "right-size" existing transmission facilities, not just the owner of those facilities and not solely facilities that has reached the end of useful life as declared by the owner of the existing facilities.

[189] *Id*.

entire transmission facility rather than the replacement of a part of an existing transmission facility."[190]

A so-called "right-sized replacement transmission facility" for which Order No. 1920 mandates a preference would meet each of the criteria that the Commission found, under Order No. 1000 progeny, are not entitled to an exception from the requirement to remove incumbent preferences in the regional context. The Final Rule casually ignores Order No. 1000-A and subsequent precedent that distinguishes what is a regionally planned and cost-allocated upgrade for which incumbent transmission owners were allowed to maintain their self-granted from a new transmission facility, even one requiring the removal of existing transmission, for which a continued self-granted preference was determined unlawful under Section 206. Order No. 1920 adopts a wholly new, expanded understanding of projects that are considered "replacements" and then mandates a preference, as a claimed exception to Order No. 1000, notwithstanding that the Commission already fully addressed the issue.

Under Order No. 1920's new Long-Term Transmission Needs process, transmission owners will identify transmission facilities that they intend to replace in the next ten years.[191] The regional planning process may determine that the transmission owner-identified existing transmission facility can be altered to meet a Long-Term Transmission Need[192] while addressing

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[190] *Id.* at P 45 (*citing* Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.*and N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,040, at P 96 (2015) (*citing Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 at P 238) (emphasis added). The Commission explained that its decision was based on "the specific facts NYSIO presents, which are that the new transmission facility would connect to the transmission system in a different configuration (i.e., connect to different buses and/or substations), result in a different power flow, increase voltage/transfer capability, and perform different transmission functions on the bulk power system as compared to the existing transmission line that was retired." *NYISO*, 175 FERC ¶ 61,038 at P 45.

[191] Order No. 1920 at P 1677.

[192] A Long-Term Transmission Need is defined as transmission needs identified through the new Long-Term Regional Transmission Planning process using the required planning criteria. *Id.* at P 39.

the transmission owner's need to replace the existing transmission facility.[193] Order No. 1920 declares that so long as the resulting project is located in the same general route or right-of-way as the existing transmission facility, then the project is classified as a "right-sized replacement transmission facility" and mandates that the project be assigned to the transmission owners of the existing facility and exempted from a competitive process. The Long-Term Transmission Need regional facility could replace an entire existing transmission facility rather than a part of an existing transmission facility. Order No. 1920 offers no explanation how its new term "replacement transmission facilities" is not, as the above precedent declared, an "entirely new transmission facility[y]" and directly contrary to the referenced precedent. In fact, the Commission seeks to mask the clear discrepancy by asserting "[w]e believe these clarifications are necessary to ensure that use of the right-sizing reform addresses *replacement* transmission facilities and not entirely new transmission facilities"[194] notwithstanding that the Commission has already determined that replacement of an entire transmission facility is an entirely new transmission facility.

In addition, providing the Monopoly Preference for a new transmission facility "located in the same general route as, and/or uses or expands the existing rights-of-way of, the existing transmission facility . . ."[195] contravenes existing Commission precedent on the use of rights-of-way. Under Order No. 1000-A, the use of an existing right-of-way is not determinative of whether a transmission project is a new transmission facility: "The issue is not whether the upgrade requires the expansion of an existing right-of-way, but whether the new transmission facility is an upgrade

[193] *Id*. at P 1679.

[194] Order No. 1920 at P 1679.

[195] *Id*. at P 1678.

to an incumbent transmission provider's own facilities."[196] The Commission rejected MISO's proposal to give a preference to transmission owners for transmission facilities built on the transmission owner's right-of-way.[197] This is because the Commission had already determined in Order No. 1000 that issues surrounding use of rights-of-way was an issue of law for the authority granting the right-of-way.[198] Specifically, Order No. 1000 found

> …nor does this Final Rule grant or deny transmission developers the ability to use rights-of-way held by other entities, even if transmission facilities associated with such upgrades or uses of existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation. The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.[199]

As the Commission is aware,[200] some states have determined that right-of-way are held by incumbent utilities on behalf of the consumers that paid for them and that where regional needs warrant the replacement or removal of an existing transmission facility. The right-of-way should be available to all transmission developers. To facilitate NYISO's competitive solicitation, the NYPSC required that incumbent transmission owners make their existing rights-of-way available to non-incumbent developers."[201] In so requiring, the NYPC noted that "[t]he utility company is the steward of the property held for the benefit of its ratepayers . . .."[202]

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[196] Order No. 1000-A at P 427.

[197] *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 at P 244.

[198] Order No. 1000 at P 319.

[199] *Id*.

[200] Comments of LS Power Grid, LLC at 51.

[201] Proceeding on Motion of the Commission to Examine Alternating Current Transmission Upgrades, et al., Order Finding Transmission Needs Driven by Public Policy Requirements, NYPSC Case No. 12-T- 0502 at Appendix B (December 17, 2015) at 58-60.

[202] *Id*.

Thus, providing a mandated federal monopoly for regional transmission projects located on the existing transmission owner's right-of-way or "same general route"[203] is directly contrary to existing precedent and Order No. 1920 failed to explain the deviation. Without reasoned explanation or justification, the Commission has jettisoned its existing distinction between upgrades for which a retained preference was allowed by Order No. 1000 and entirely new transmission facilities. Creating a new phrase, "right-sized replacement transmission facility," for what Order No. 1000 declared are entirely new transmission facilities does not change their nature or the precedent of Order No. 1000 and its progeny. Order No. 1920's incumbent Monopoly Preference is thus arbitrary and capricious.

### D. ERROR #4: The Right-Sizing Monopoly Preference Adopted In Order No. 1920 Has Not Been Demonstrated To Be Just, Reasonable, And Not Unduly Discriminatory, And Is Unjust, Unreasonable, Unduly Discriminatory, And Contrary To The Public Interest For Several Reasons.

In Order No. 1920, the Commission attempted to justify its right-sizing Monopoly Preference by contending that "it will result in transmission providers identifying, evaluating, and selecting replacement transmission facilities that more efficiently or cost-effectively address Long-Term Transmission Needs."[204] The Competition Coalition recognizes and appreciates Order No. 1920's objective in trying to optimize regional planning. The Competition Coalition provided robust comments to the Commission's ANOPR advocating a variety of mechanisms to enhance regional planning, primarily related to reining in abuses of individual transmission owner local planning.[205] While the Competition Coalition shares the Commission's overarching desire for better regional planning, Order No. 1920 does not demonstrate that the right-sizing Monopoly

[203] Order No. 1920 at P 1679.

[204] Order No. 1920, ¶ 1577.

[205] *See* Competition Coalition ANOPR Comments at 15-19, 22-25, 34-39.

Preference it adopts is just and reasonable, supported by substantial evidence, the product of reasoned decision-making, and consistent with the public interest. In Order No. 1000, FERC previously found that a right of first refusal or ROFR, a type of preference in regional transmission planning, is contrary to the public interest:

> federal rights of first refusal create opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers within existing regional transmission planning processes. The Commission has long recognized that it has a responsibility to consider anticompetitive practices and to eliminate barriers to competition. Indeed, the Supreme Court has said that 'the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.' In requiring the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements, we are acting in accordance with our duty to maintain competition. [206]

Order No. 1920 fails to demonstrate that its deviation from its pro-competition findings in Order No. 1000 will result in just and reasonable rates.

The appellate courts have affirmed that monopoly preferences are against the public interest.[207] But Order No. 1920 fails to demonstrate that the right-sizing Monopoly Preference is consistent with the public interest. With its mandated right of first refusal for right-sized replacement facilities, FERC has reversed its position and did not adequately explain the reasons for its departure from historic policy and precedent.[208]

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[206] Order No. 1000 at P 286 (footnotes omitted) (citing Gulf States Utils. Co., 5 FERC ¶ 61,066 at 61,098 and Otter Tail Power Co. v. United States, 410 U.S. 366 at 374 (1973)) (emphasis added).

[207] *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016).

[208] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (when an agency changes its policy, it must "show good reasons for the new policy").

### 1. Order No. 1920 Fails to Engage and Rebut Comments Challenging the Right-Sizing Monopoly Preference.

Order No. 1920 fails to meaningfully engage with the NOPR comments and rebut the arguments in those comments. In Order No. 1000, the Commission thoroughly engaged and rebutted the anti-competition comments that opposed elimination of the federal ROFR.[209] In contrast, Order No. 1920 did not rebut, let alone thoroughly engage, the pro-competition comments and supporting evidence. Instead, Order No. 1920 advanced the following general rationale:

> we find that permitting a federal right of first refusal for right-sized replacement transmission facilities will *encourage* transmission providers to provide their best in-kind replacement estimates, because they will have certainty that they will not lose the opportunity to invest in any in-kind replacement transmission facility that is then selected as a right-sized replacement transmission facility.[210]

The Commission's statutory obligation to consumers is not to "encourage" but to regulate. Order No. 1920's specific failures relative to its regulatory obligation as addressed certain key pro-competition comments are discussed in more detail below.

#### a. Order No. 1920 Does Not Address the Pro-Competition Comments of the US Department of Justice and the Federal Trade Commission.

The U.S. Department of Justice ("DOJ") and U.S. Federal Trade Commission ("FTC"), two federal agencies charged with protection of the public interest, consumers, and competitive market forces, emphasized to the Commission:

> Reforms that will encourage new regional transmission development can take place without abandoning competition. FERC's proposals around transmission planning and cost allocation may go a long way toward addressing the logjam that FERC has identified, and those reforms can go further if FERC addresses the anticompetitive incentive and ability for incumbent transmission owners to influence transmission planning processes to favor transmission projects over which they can maintain their monopolies.[211]

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[209] *See* Order No. 1000 at PP 2847-292.

[210] Order No. 1920 at P 1703 (emphasis added).

[211] Joint Comment of the U.S. Department of Justice and Federal Trade Commission at 10.

DOJ and FTC urged FERC "to examine the competitive impacts that the proposed ROFR is likely to have, including increasing entry barriers that may result in higher prices for transmission and electricity, reducing innovation, and a less efficient, less reliable, and less resilient grid" and "to avoid restrictions on competition unless they are necessary and narrowly tailored to achieve FERC's stated mission [of consumer protection]."[212] But there is nothing in Order No. 1920 that demonstrates that FERC gave any due consideration to the adverse impacts of preferences when it decided to broadly re-establish the policy of granting the Monopoly Preference to incumbent public utilities to develop, construct, and own regional right-sized replacement facilities.

**b. Order No. 1920 Does Not Rebut the Harvard Electricity Law Institute's Anti-ROFR Comments.**

The Harvard Electricity Law Institute accurately captured the framework that strongly favors incumbent transmission owners. The Harvard Electricity Law Institute argued that:

> Even if the Commission were to reinstate incumbent exclusivity through Rights of First Refusal (ROFRs), utilities would still have incentives and opportunities to overbuild in their local service territories. Public Utilities explicitly control local planning processes. With this control, they can pursue projects that are most attractive to them regardless of their effects on wholesale and transmission competitors and customers. As we discuss in Part II, the Commission does not scrutinize utilities' local spending, allowing utilities to pursue low-risk projects that can obviate the need for regional projects and that earn them at least the same return as regional projects that bring broader benefits. Moreover, under the Commission's planning rules, utilities are free to rebuild the grid of the past without informing regulators, customers, and competitors of their plans or sharing any data or modeling to justify their spending. Recent Commission proceedings about so-called "end-of-life" transmission show that Public Utilities are zealously protecting their exclusive opportunities to rebuild interstate transmission located within their state-provided retail service territories.[213]

[212] *Id*. at 11.

[213] Harvard Electricity Law Initiative comments on Transmission Planning Reforms and Prudence Reviews, under RM21-17 at 22, filed 10/12/2021.

Order No. 1920 largely ignored this significant aspect of the problem[214] and, instead, established a new framework that further incentivizes the behavior – by mandating creation of the Monopoly Preference for so-called right-sized replacement facilities, transmission providers can pursue grid replacement infrastructure and enjoy regional cost allocation without going through competitive bidding in the regional process.

**c. Order No. 1920 Was Non-responsive to the R Street Institute's Pro-Competition Comments.**

Like others, the R Street Institute focused on the *status quo* advantages to incumbent transmission owners. The R Street Institute commented:

> The mere presence of nonincumbent suppliers imposes economic discipline on the behavior of an incumbent supplier in any industry. The economics literature clarifies this under a number of conditions, such as incumbent bidding behavior shifting based on the perceived threat level and uncertainty associated with nonincumbents.12 The comments of the Department of Justice (DOJ) and Federal Trade Commission (FTC) conclude that in the case of transmission competition, "incumbents tend to make more competitive proposals when they face competition."13 As such, competition yields benefits even when incumbents win, and the proportion of projects won by incumbents has no bearing on the benefits of competition.[215]

Order No. 1920 is silent on the impact of competition in bringing down consumer costs, and thus conversely the adverse impact on consumer costs from a mandatory preference. It does not make any argument that a ROFR for right-sized replacement projects is cost-effective, that the benefits of eliminating competition for these projects outweighs the costs. And even more troublesome is that Order No. 1920 does not even affirmatively demonstrate that the benefits will materialize due to the implementation of the preferential "right-sizing" ROFR.

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[214] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem)).

[215] Reply Comments of R Street Institute under RM21-17 at 3.

### d. Order No. 1920 Ignores LS Power's Comments That Illustrate the Value of Competition in Driving Down Return on Equity Exposure.

Similarly, Order No. 1920 is silent in response to arguments that show the value of competition. LS Power established in its comments that, in considering between return on equity and capital structure alone, on a $100 million project the distinction on competed and non-competed projects would mean $14 million in excess rates to consumers over the life of the project.[216] Competitive solicitations yield cost containment, thereby establishing the value of competition, in contrast to the longstanding construct wherein incumbent transmission owners have built billions of dollars in non-competed projects, denying ratepayers billions in such savings.[217] By failing to rebut this argument, Order No. 1920 fails to address another significant aspect of the problem – that its newly crafted monopoly preference negates the economic value of a proven alternative.

LS Power also pointed out that permitting any type of ROFR will discourage the participation of qualified developers.[218] Order No. 1920 did not address the impact of implementing the right-sizing Monopoly Preference on the market and the viability of the competitive transmission developer industry.

### e. Order No. 1920 Does Not Respond to NextEra's Problem Definition.

Another competitive developer, NextEra, commented that "the premise underlying the Commission's proposal to discard competition in favor of new FERC-granted monopolies – a purported need to realign the investment incentives of incumbent transmission owners so their distaste for competition does not impede regional transmission expansion – rests on illogical conjecture

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[216] Reply Comments of LS Power Grid at 19-20 (citing LS Power Grid ANOPR Comments, Appendix II, at 11).

[217] *See id.*

[218] *See* LS Power Grid Initial Comments to NOPR at 90.

rather than record evidence."[219] The issue is not that incumbent transmission providers must be incentivized to right-size transmission projects. As a result, NextEra was correct to point out:

> the issue is not whether the Commission's rules are encouraging sufficient investment by one class of developer or another; it is whether they are, as the Commission stressed in Order No. 1000-A, providing for "robust regional transmission planning" and "lead[ing] to the identification of more efficient and cost-effective transmission facilities."[220]

When a problem is mischaracterized and not accurately defined, the solutions fail to achieve their objectives. As the Commission's mandated Monopoly Preference for right-sized replacement facilities is a misdirected attempt at solving the perceived problem of a shortage of investment or improper transmission owner incentives in regional transmission infrastructure, the revival of monopoly preferences like the right-sized ROFR will not be effective at facilitating innovative and efficient investment in regional transmission facilities, and will have adverse impacts to competition, rates, and consumers. When examining Commission-mandated monopoly preferences, the Commission must not circumvent the two-pronged process for just and reasonable ratemaking under FPA Section 206. If the Commission followed the two-pronged process, then the process would have revealed that there is not a sufficient relationship between establishing a monopoly preference and ensuring increased, cost-efficient, innovative, holistic transmission investment. Order No. 1920's Monopoly Preference mandate responds to a mischaracterized problem, with consumers facing the repercussions of the flawed decision-making.

[219] NextEra Initial Comments to NOPR at 18.

[220] NextEra Initial Comments to NOPR at 27, citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 179.

### f. Order No. 1920 Did Not Engage And Rebut The Comments And Analytical Evidence Presented By The Electricity Transmission Competition Coalition, Including The Brattle Reports And Joskow Study.

The Competition Coalition, a multi-sector organization with a presence across the nation, submitted five extensive rounds of comments and evidence in the Commission's rulemaking proceeding. And yet, Order No. 1920 barely acknowledges the existence of these comments, let alone confronts the Competition Coalition's arguments to refute the pro-competition evidence in the docket, such as the Brattle Report reports from 2021 and 2019.[221] The Competition Coalition incorporates by reference the evidence it filed in this docket and asks the Commission on rehearing to explain why the evidence is not compelling and why any of the fully rebutted "counterevidence" compels the implementation of the preferential right-sizing Monopoly Preference or ROFR.

Order No. 1920 does not evaluate a 2019 study by Paul Joskow that found that progress with the competitive transmission procurement model has been slow but promising.[222] In turn, Order No. 1920 does not consider any of Dr. Joskow's recommended refinements to capture more benefits from competition were considered, let alone cite the fact that several commenting parties referred to Dr. Joskow's study.[223]

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[221] *See* Competition Coalition Reply Comments at 18 (citing Johannes Pfeifenberger et al., "Transmission Planning for the 21st Century: Proven Practices that Increase Value and Reduce Costs," October 2021, pp. 19-23. (available at: https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Planning-for-the-21st-Century-Proven-Practices-that-Increase-Value-and-Reduce-Costs.pdf); *see also* Competition Coalition Reply Comments at 29 (citing Johannes Pfeifenberger et al., "Cost Savings Offered by Competition in Electric Transmission," April 2019, pp. 2, 20, *available at* https://www.brattle.com/wp-content/uploads/2021/05/17805_cost_savings_offered_by_competition_in_electric_transmission.pdf (last accessed June 12, 2024).

[222] *See* Competition Coalition Reply Comments at 22 (citing Paul Joskow, "Competition for Electric Transmission Projects in the U.S.: FERC Order 1000," MIT Center for Energy and Environmental Policy Research, March 2019, pp. 1, 55 https://ceepr.mit.edu/wp-content/uploads/2021/09/2019-004.pdf; *see also* Reply Comments of California Public Utility Commission at 6.

[223] *See* Competition Coalition Comments at 22; Reply Comments of California Public Utility Commission at 6; NextEra Initial Comments, Morris Affidavit at P 24, n. 31, Harvard ELI ANOPR Comments at 3, n.8, and LS Power Grid ANOPR Reply Comments at 6-11.

### g. Order No. 1920's Expansion of Monopoly Preferences Is Inconsistent with the Biden Administration's Policy On Competition.

As discussed above, monopoly preferences are fundamentally anticompetitive.[224] Executive Order 14036—Promoting Competition in the American Economy[225] is a policy that FERC, even if it is an independent agency, should take into consideration regarding its decision on monopoly preferences. Section 1 of Executive Order 14036 declares:

> The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better service, and lower prices.

Section 2(g), further provides:

> This order recognizes that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy. Such an approach is supported by existing statutory mandates. Agencies can and should further the polices set forth in section 1 of this order by, among other things, adopting pro competitive [sic] regulations and approaches to procurement and spending, and by rescinding regulations that create unnecessary barriers to entry that stifle competition.

Monopoly preferences directly contradict the policy goals established by this Executive Order. In fact, the sole purpose of monopoly preferences is to prohibit competition for certain transmission facilities and to grant the very monopoly preferences the Executive Order sought to eliminate. Monopoly preferences are a barrier to entry that raises costs to consumers and inhibits innovation

[224] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016).

[225] https://www.govinfo.gov/content/pkg/DCPD-202100578/pdf/DCPD-202100578.pdf (last accessed June 12, 2024).

in the transmission sector.[226] It is simply the self-interested profit incentives of incumbent utilities that motivates their desire for a monopoly preference. As a result, Order No. 1920's Monopoly Preferences ignores the broader economic policy context that calls for competitive solutions.

### 2. The Right-Sizing Monopoly Preference Is Likely To Encourage Gaming, And Is Likely To Be Abused And Creatively Exploited In Compliance Filings And In Practice.

Incumbent transmission utilities have effectively evaded competition and the cost-reducing benefits that competition can provide for consumers. "Between 2013 and 2017, only an estimated 3% of the total U.S. transmission investments have been subject to competitive processes."[227] Instead of committing to competition, Order No. 1920 creates the Monopoly Preference right-sizing replacement projects that will effectively allow incumbent transmission owners to further evade competition and competitive processes.[228] Under Order No. 1920, incumbent public utilities can designate potential in-kind replacements of existing facilities with no check or discipline on determining replacement facilities. Then the incumbent public utility obtains the monopolistic right over development of any regional facilities that would displace the in-kind replacement, in the same general route. And the incumbent public utility enjoys the right to regionally cost allocate the new project without the need for any competitive bidding. What a deal.

As the Competition Coalition noted in its Reply Comments, there are "seven ways in which utilities evade competition and regional planning benefits: 1) small utility planning areas; 2)

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[226] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016) (ROFRs "create[] a potential for higher rates to consumers of electricity than if competition to create transmission facilities in transmission companies' service areas was allowed"); *also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 74 (D.C. Cir. 2014) ("rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry").

[227] J. Pfeifenberger, et al., Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value at 18 (Apr. 2019).

[228] Comments by the Electricity Transmission Competition Coalition in Opposition to Certain Aspects of the Proposed Rule under RM21-17 at 65, filed 8/17/2024.

differing transmission owner incentives between local and regional plans; 3) economies of scale; 4) economies of scope; 5) network externalities; 6) horizontal market power; and 7) vertical market power."[229] A ROFR or monopoly preference for right-sized replacement facilities implicates many of these seven methods for evading competition and regional planning. For example, a replacement facility will be placed into the regional transmission planning process and be cost allocated throughout the region without subjecting the replacement facility to competitive market forces (which yield innovative solutions with cost containment). The Monopoly Preference facilitates horizonal market power by enabling the incumbent transmission owner to reconstruct, modify, or enhance their facility, thereby precluding new bidders and new entrants from proposing a solution that may be more innovative or cost-efficient. The Monopoly Preference also facilitates vertical market power in the event of affiliate owned generation, given that a transmitting utility will be incentivized to build or create an undue preference in a way that benefit's that utility's affiliate generation. Order No. 1920 does not demonstrate or explain how the transmission providers will accomplish the Commission's laudable Order No. 1000 goals of efficient and cost-effective replacement facilities using the right-sizing Monopoly Preference.

By providing incumbents the Monopoly Preference for right-sized replacement facilities, Order No. 1920 only exacerbates the very problem it tried to solve in the Final Rule by doubling the incentive for incumbent utilities to plan even more less efficient and cost-effective local transmission facilities. Specifically, under the current planning requirements, an incumbent is only incentivized to plan local upgrades because, while tending to comprise smaller and less chunky

[229] Reply Comments of the Electricity Transmission Competition Coalition at 18 (citing Johannes Pfeifenberger et al., "Transmission Planning for the 21st Century: Proven Practices that Increase Value and Reduce Costs," October 2021, pp. 19-23. (available at: https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Planning-for-the-21st-Century-Proven-Practices-that-Increase-Value-and-Reduce-Costs.pdf)).

additions to rate base, at least such upgrades cannot be competitively awarded to a non-incumbent. Consequently, the profit-motivated incumbent will be incentivized to add even more in-kind replacements into its local plan because of the possibility that the planning region will then right-size those projects into an even larger facility in which the incumbent utility would be allowed to invest without any competition, thus preserving, reinforcing, and expanding its monopoly position.[230]

LS Power showed that the incumbent transmission owners are taking advantage of the problems they created "by working over the last decade to circumvent regional planning and competition through multiple means – as an avenue to advocate for the Commission rewarding their obstructionist behavior by reinstating the rights of first refusal the Commission banished in 2011 under Section 206 of the Federal Power Act."[231] LS Power backed up this claim by citing to the incumbent utility-funded report from Concentric Energy Advisors to show that transmission providers opted to develop local reliability projects and immediate need projects that are not subject to the Commission's oversight and competition.[232] By reinstituting a right-sizing ROFR or monopoly preference in any format whatsoever, the Commission is rewarding incumbent transmission owners for playing games at the expense of consumers, competitive markets, and Order No. 1000's goals. As the Commission held in Order No. 1000:

> Just as it is not in the economic self-interest of public utility transmission providers to expand transmission capacity to allow access to competing suppliers, it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs. We conclude that an incumbent transmission provider's ability to use a [ROFR] to act in its own economic self-

[230] *Id*. at 66-67.

[231] Reply Comments of LS Power Grid, LLC at 70.

[232] *See Id*. at 72.

> interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process." . . . What was true in 2011 is just as true now – incumbent transmission utilities will use a ROFR to act in their own economic self-interest to discourage new entrants from proposing new transmission projects in the regional transmission planning process.[233]

Hence, by removing all monopoly preferences in regional and local planning, the Commission would facilitate market competition. Effective competition is one of the most effective policies for transmission reform to maximize net benefits to consumers, with cost savings in the range of 20%-40%.[234] Thus, Brattle estimated that "if competition can reduce costs by 25% on average, the cost savings from competition on one third of the planned U.S. transmission investments would be approximately $8 billion over five years."[235]

Hence, the Order No. 1920's ROFR mandate will continue to lead to gaming based on the local/regional dichotomy, depriving the regulated community of more robust competition and cost-savings for consumers. Instead of creating an outcome where projects will be subject to competition, Order No. 1920 induces the incumbent transmission owners to continue planning even more less efficient and cost-effective local projects that can then later be displaced in a regional plan by a "right-sized" project. Instead of enlarging the pernicious loophole, the Commission should close the loophole and restore integrity to the regional transmission planning process by reversing its decision in Order No. 1920 to provide the Monopoly Preference.

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[233] Reply Comments of the Electricity Transmission Competition Coalition at 28 (citing Order No. 1000 at P 256).

[234] *Id*. at 22-23 citing Jennifer Chen and Devin Hartman, "Transmission Reform Strategy from a Customer Perspective: Optimizing Net Benefits and Procedural Vehicles," R Street Policy Study No. 257, May 2022. https://www.rstreet.org/wp- content/uploads/2022/05/RSTREET257.pdf. and J. Pfeifenberger, et al., Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value at 13 (Apr. 2019).

[235] J. Pfeifenberger, et al., Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value at 13 (Apr. 2019).

### 3. The Regulatory Language in Appendix B About Identifying Potential Opportunities to Right-Size Replacement Transmission Facilities Is Ambiguous, Unworkable, and Will Lead to Confusion and Litigation.

The perceived need for the implementation of the "right-sizing" Monopoly Preference Order No. 1920 provides is merely aspirational. While Order No. 1920 could have set out in the regulatory language criteria used to identify, evaluate, and select replacement transmission facilities, it did not do so. As demonstrated herein, the regulatory language below (from Appendix B in Order No. 1920) is ambiguous and unworkable.

> ***Identifying Potential Opportunities to Right-Size Replacement Transmission Facilities***
>
> *As part of each Long-Term Regional Transmission Planning cycle, Transmission Providers in each transmission planning region shall evaluate whether transmission facilities operating at or above a voltage threshold not to exceed 200 kV that an individual Transmission Provider that owns the transmission facility anticipates replacing in-kind with a new transmission facility during the next 10 years can be "right-sized" to more efficiently or cost-effectively address Long-Term Transmission Needs, as discussed in Order No. 1920. The process to identify potential opportunities to right-size replacement transmission facilities must follow the process outlined in Order No. 1920. The Transmission Providers in each transmission planning region shall include in their Tariffs a cost allocation method for right-sized replacement transmission facilities that are selected in the regional transmission plan for purposes of cost allocation.*

First, "anticipates" is undefined and open-ended, leaving endless discretion with the Transmission Provider and transmission facility owner to define what facilities could be "right-sized" to more efficiently or cost-effectively address Long-Term Transmission Needs. The regulatory language does not set forth any limitations or conditions concerning the identification of facilities as eligible for an in-kind replacement and right-sizing opportunity, especially given transmission owners would not necessarily be obligated to build that replacement facility.[236] Without any limitations or conditions on this right-sizing opportunity (and without oversight by

[236] *See* Order No. 1920 at P 1736 ("We note that a transmission provider's list of in-kind replacement estimates…is a non-binding estimate and does not require that transmission provider to undertake replacement work").

an independent transmission planner), a transmission facility owner could be incentivized to prematurely retire[237] or modify transmission facilities simply by identifying facilities for the right-sizing opportunity.

Second, while the industry professionals mostly understand the concept of "right-sizing," the term should be defined and not retained in quotations to ensure all parties are on the same page as to what triggers or necessitates a "right-sizing" replacement facility opportunity. The process around identifying these opportunities needs to be more clearly defined and outlined in the regulatory language. Instead, the above regulatory language simply states: "the process outlined in Order No. 1920." What process? Where is that process clearly defined and why was it not included in the regulatory language?

Third and similarly, the phrase "as discussed in Order No. 1920," makes this regulatory provision entirely unworkable, especially in light of the fact that the Final Rule was over 1,300 pages. The regulatory language is meant to be legally binding and, therefore, requires more specificity and clarity. It is not clear which elements or parts of Order No. 1920 are meant to be incorporated by reference, and it is important to note that several areas in Order No. 1920 simply refer to other sections and use phrases such as "as discussed above" or "as discussed below."[238] The multiple uses of cross-references does not provide regulatory clarity and certainty to stakeholders and will create several complexities and litigious challenges on compliance.

Fourth, Order No. 1920 did not explain how it arrived at the "not to exceed 200 kV" threshold. Order No. 1920 did not set any upper bounds on the extent to which a facility could be

[237] While there may be some instances where "premature retirement" is appropriate and consistent with Good Utility Practice to holistically address system needs, such premature retirement should not result from a Monopoly Preference that could incentivize premature retirement.

[238] *See, e.g.*, Order No. 1920 at P 1576 ("As discussed above, the record demonstrates…").

"right-sized" or "up-sized." Could an incumbent transmission owner be provided an opportunity to transform a 130 kV line into a 500 kV line (or higher) under this regulatory provision? There are no limitations or controls on the extent to which this rule would facilitate incumbent control over developing regional transmission facilities while avoiding competitive market forces.

Fifth, the regulatory languages fails to define or explain "more efficiently" and "cost-effectively." More efficient than what? How is "more efficient" to be determined? "Cost-effectiveness" or "efficiency" must be defined pursuant to the objectives that the decision-maker (in this case, the transmission provider) seeks to accomplish. For cost-effectiveness, the decision-maker compares the cost to the value of achieving some measurable unit of the objectives. The result is a ratio of costs to benefits. On the other hand, for efficiency, the decision-maker compares the value of the objectives to the cost or time needed to achieve them. The fact that the Transmission Provider is the one who will be making these decisions is problematic – they may define and measure the objectives with the Transmission Provider's own interests at heart, to the expense of consumers (which would result in an abdication of the Commission's duty to protect consumers). Such a result is unjust, unreasonable, unduly discriminatory or preferential.

Sixth, no independent entity is given a clear opportunity to administrate and carry out the "right-sizing" opportunities or monitor against planning abuses when exercising preferential rights to maintain monopolistic control over facility replacements. Accordingly, the absence of such an entity and role in the regulatory language confirms the need for an Independent Transmission System Planner or Monitor to objectively evaluate Long Term Transmission Needs in response to meaningful input from all stakeholders. Order No. 1920 did not engage at all the requests of the Competition Coalition and other parties (such as the California Public Utilities Commission charged with protecting the public interest) in comments to require an Independent Transmission

System Planner or Monitor to ensure that the most cost-efficient transmission solutions are selected in the regional plan.

The Competition Coalition respectfully submits that the regulatory language is unworkable and will lead to confusion, compliance abuses, gaming, and litigation. Rehearing is warranted.

## IV. CONCLUSION

**WHEREFORE,** the Competition Coalition respectfully requests that the Commission grant rehearing of Order No. 1920 for the reasons set forth herein.

Respectfully submitted,

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Dated: June 12, 2024

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 12th day of June, 2024.

*/s/ Kenneth R. Stark*

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# Appendix A

## Electricity Transmission Competition Coalition Members

Ag Processing
Alliance of Western Energy Consumers
Aluminum Association
American Chemistry Council
American Forest & Paper Association
American Foundry Society
American Iron and Steel Institute
Ardagh Group
Arglass Yamamura
Arkansas Electric Energy Consumers, Inc.
Arkansas Forest and Paper Council
Association of Businesses Advocating for Tariff Equity
CalPortland Company
Can Manufacturers Institute
Cardinal Glass Industries
Carolina Industrial Group for Fair Utility Rates
Carolina Utility Customers Association, Inc.
Century Aluminum
Chemical Industry Council of Illinois
Chemistry Council of New Jersey
Coalition of MISO Transmission Customers
Coastal Energy Corporation
Commercial Metals Company
Consumers Council of Missouri
Council of Industrial Boilers Organization
Delaware Energy Users Group
Digital Realty
Divers Processing Company, Inc.
Domtar Corporation
Eramet Marietta Inc.
Formosa Plastics Corporation, USA
Foundry Association of Michigan
Gerdau Ameristeel Inc.
Glass Packaging Institute
Illinois Industrial Energy Consumers
Indiana Cast Metals Association
Indiana Industrial Energy Consumers
Industrial Energy Consumers of America
Industrial Energy Consumers of Pennsylvania
Industrial Energy Users-Ohio
Industrial Minerals Association-North America

Iowa Business Energy Coalition
Iowa Industrial Energy Group, Inc.
Iron Mining Association of Minnesota
Kansas Chamber of Commerce
Kansas Manufacturing Council
Kimberly-Clark Corporation
Large Energy Users Coalition (NJ)
Lehigh Hanson, Inc.
LS Power Development, LLC
Maine Industrial Energy Consumer Group
Marathon Petroleum Company
Marathon Petroleum Company
Maryland Office of People's Counsel
Messer Americas
Metalcasters of Minnesota
Michigan Chemistry Council
Midwest Food Products Association
Minnesota Large Industrial Group
Multiple Intervenors, NY
National Council of Textile Organizations
NextEra Energy
Niskanen Center
North Carolina Manufacturers Alliance
NovoHydrogen
Office of the People’s Counsel for the District of Columbia
Ohio Cast Metals Association
Ohio Chemistry Technology Council
Ohio Energy Group
Ohio Manufacturers’ Association
Oklahoma Industrial Energy Consumers
Olin Corporation
Owens-Illinois
Pennsylvania Energy Consumer Alliance
PJM Industrial Customer Coalition
Portland Cement Association
Public Citizen, Inc.
R Street
Rain CII Carbon LLC
Resale Power Group of Iowa
Retail Industry Leaders Association
Riceland Foods, Inc.
Rio Tinto
Skana Aluminum Company
Steel Manufacturers Association
Sylvamo
Texas Cast Metals Association

TimkenSteel Corporation
Vallourec STAR LP
Vinyl Institute
Virginia Manufacturers Association
West Virginia Manufacturers Association
Wisconsin Cast Metals Association
Wisconsin Industrial Energy Group